United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,266

ABRAHAM DOBKIN,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal from Judgment of the
District of Columbia Court of Appeals

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QUESTIONS PRESENTED

1. Whether, under D. C. Code §11-715a, a defendant in the District of Columbia Court of General Sessions, Criminal Division, is entitled to trial by jury when charged, in an information, with a violation of D.C. Code, §32-788, for which the maximum penalty may be a $300 fine and ninety days imprisonment.

2. Whether a second offender, who is not charged as such in the information, is subject to the 50 per cent greater penalties provided in D. C. Code, §22-104 and, thereby, entitled to trial by jury under D. C. Code, §11-715a.

3. Whether a Jewish defendant in a criminal case may be required, over his objection, to proceed to trial on Friday night, the advent of his religious Sabbath.

4. Whether D. C. Code, §§ 32-781 to 32-789, is properly read to forbid a party to an adoption from using an attorney as an intermediary and, if so, whether the imposition of a criminal penalty upon such an attorney is constitutionally permissible as against an assertion that the standard of conduct is not adequately defined by the statute.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was charged in an information filed in the District of Columbia Court of General Sessions, Criminal Division, on September 19, 1962, alleging a violation of D. C. Code, §32-785, Act of April 22, 1944, c. 174 (58 Stat. 194) as amended (J.A. 2-3). His conviction and sentence (J.A. 53, 55) was affirmed by the District of Columbia Court of Appeals on November 4, 1963 (J.A. 55-60). A timely motion for rehearing was denied on December 2, 1963 (J.A. 61). On February 3, 1964, a panel of this Court granted appellant's petition for leave to

prosecute an appeal from the District of Columbia Court of Appeals. The jurisdiction of this Court is based upon D. C. Code, § § 11-321b and 17-104, Act of December 23, 1963, Public Law 88-241.

STATEMENT OF THE CASE

Appellant, a practicing attorney (J.A. 34), was charged under D. C. Code, § 32-785, in an information which reads as follows:

> " . . . on to wit the eighteenth day of May and divers other days between that date and the date of the filing of the information in the year A.D. nineteen hundred and sixty two, in the District of Columbia aforesaid did then and there place and arrange, or assist in placing or arranging for the placement of a certain infant child born to Jacqueline Zelrick, in a family home, to wit, the home of Morris and Louise Blake for adoption, the said Abraham Dobkin being then and there neither the parent, guardian or relative within the third degree of the said infant child nor a licensed child-placing agency. . . . " (J.A. 2)

He pleaded not guilty and moved, insofar as here pertinent, for a trial by jury (J.A. 3) and, later,for an adjournment from Friday until Monday (J.A. 9) on the grounds that, as a Jew, his religious beliefs regarding Friday would be offended by forcing him to trial after sundown on that day, the advent of his Sabbath. Both such motions were denied (R. 23; J.A. 16).

The evidence presented at trial against the appellant was generally uncontradicted and is fairly summarized at pages 2 and 3 of the Opinion of the District of Columbia Court of Appeals. So far as is here pertinent, that summary may be adopted.

> "The evidence against appellant was that a woman expecting a child contacted him and asked for help in placing the child for adoption; that appellant later called the expectant mother informing her that a couple from New York, who were interested in adopting her baby, would be in town and he arranged a meeting between them; that the New York couple gave him money to be used in supporting the expec-

tant mother; that when the baby was born the mother contacted appellant who went to the hospital and had her sign adoption papers he had prepared; that appellant and the couple escorted the mother and the baby from the hospital, and the couple then took the child with them and the mother went home.

"Appellant's testimony did not vary substantially from the above except that he stated after his meeting with the mother, he was contacted by the New York couple who said they knew of a woman in Washington who wanted to place her expected child for adoption. He said they gave him the name of the woman with whom he had already conferred. . . ." (J.A. 56-57)

The District of Columbia Court of General Sessions, Criminal Division, convicted the appellant and sentenced him to pay a fine of $300 and to serve ninety days (J.A. 55).

The District of Columbia Court of Appeals affirmed the conviction and denied a timely petition for rehearing (J.A. 60, 61).

STATUTES INVOLVED

D. C. Code, § 32-785, Act of April 22, 1944, c. 174 (58 Stat. 194), as amended, provides in pertinent part as follows:

"No person other than the parent, guardian, or relative within the third degree, and no firm, corporation, association, or agency, other than a licensed child-placing agency, may place or arrange or assist in placing or arranging for the placement of a child under sixteen years of age in a family home or for adoption."

D. C. Code, § 32-788, Act of April 22, 1944, c. 174 (58 Stat. 195), provides as follows:

"Any person, firm, corporation, association, or public agency who conducts a child-placing agency without a license as provided for in this chapter or who violates any of the

> provisions of this chapter shall, upon conviction, be fined not more than $300 or imprisoned for not more than ninety days, or both. Prosecution for violations of such sections shall be upon information in the criminal division of the municipal court of the District of Columbia by the corporation counsel of the District of Columbia."

D. C. Code, § 11-715a, Act of March 3, 1925, c. 443 (43 Stat. 1120), provides in pertinent part as follows:

> "In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury."

D. C. Code, § 22-104, Act of March 3, 1901, c. 854 (31 Stat. 1337), provides:

> "Every person upon his second conviction of any criminal offense punishable by fine or imprisonment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one-half longer than the maximum fine and imprisonment for the first offense."

SUMMARY OF ARGUMENT

Appellant, a practicing attorney, was convicted and sentenced, by a court sitting without a jury, for violating the "Baby Broker Act," D. C. Code, § § 32-781 to 32-789.

Appellant's first assertion is that he was entitled to trial by jury in the Court of General Sessions. D. C. Code, § 11-715a, provides for jury trial, on demand, in cases in which "the fine or penalty may be more than $300, or imprisonment . . . . may be more than ninety days." The statute

which appellant was charged with violating, D. C. Code, § 32-788, provides a maximum penalty of $300 or ninety days, or both, and he was assessed that penalty. This Court is now asked to overrule Rogers v. District of Columbia, 31 A. 2d 649 (D. C. Mun. App. 1942), and to hold that $300 and ninety days is greater than $300 or ninety days and that for charges of violating statutes which permit both a jury trial is required. Alternatively, since appellant was a second offender, he was liable to a 50 per cent increase in his penalty, D. C. Code, § 22-104, and by virtue of that increase clearly fell within the ambit of D. C. Code, § 11-715a.

At the start of the proceedings against appellant, he advised the court that the Jewish Sabbath had begun and that he, a Jew, had conscientious scruples against proceeding to trial. He asked for an adjournment to Monday. His request was denied. Petitioner submits that there was an inadequate showing of the District's interest in proceeding to trial on Friday rather than on Monday to justify overriding his right to the free exercise of his religion. In re Jenison, __Minn.__, 125 N.W. 2d 588 (1963); Sherbert v. Verner, 374 U.S. 398 (1963).

Appellant further asserts that the statutory scheme may not be read so as to impose criminal liability on him, a lawyer, for the conduct shown. Before such liability can be imposed, a clear legislative intent must appear. Such a clear expression by the legislature is not present. Under such circumstances prevailing professional standards should not be read as banned, for to do so raises constitutional issues in the "void for vagueness" area.

STATEMENT OF POINTS

1. The appellant was entitled to trial by jury both unqualifiedly by virtue of D. C. Code, § 11-715a and as a second offender, by virtue of the increased penalty provision of D. C. Code, § 22-104.

2. The appellant, a Jew, should not have been required, over his objections, to proceed to trial after sundown on Friday, the advent of his religious Sabbath.

3. D. C. Code, § § 32-781 to 32-789 may not properly be read to forbid a party to an adoption from using an attorney as an intermediary; if those sections are so read, it is not constitutionally permissible to assess a criminal penalty against such an attorney because the standard of conduct to which such attorney is required to adhere is not adequately defined by the statute.

ARGUMENT

I. Appellant Was Entitled to Trial by Jury.

A. By virtue of D. C. Code, § 11-715a.

D. C. Code, § 11-715a provides:

> "In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury."

The statute which appellant was convicted of violating, D. C. Code, § 32-788, provides:

> "Any person, firm, corporation, association or public agency who conducts a child-placing agency without a license as provided for in this chapter or who violates any of the provisions of this chapter shall, upon conviction, be fined not more than $300 or imprisoned for not more than ninety days, or both. Prosecution for violations of such sections shall be upon information in the criminal division of the municipal court of the District of Columbia by the corporation counsel of the District of Columbia." (Emphasis supplied.)

The appellant was sentenced to a $300 fine and ninety days in jail (J.A. 55).

Under these circumstances, the appellant asserts a right, granted by statute, to a trial by jury.

Twenty-two years ago in Rogers v. District of Columbia, 31 A. 2d 649, 652 (D. C. Mun. App. 1942), the then Municipal Court of Appeals held that dollars and days were not to be added and ruled that a defendant, charged under a statute with an offense punishable by $300 and ninety days, was not entitled to a jury trial under this statute. The court below, in this case, declined appellant's invitation to reconsider and to overrule Rogers, stating:

> "The maximum penalty for violating the Act is a fine of up to $300 or imprisonment up to ninety days, or both. Appellant argues that in applying § 11-715a, we may add days to dollars and vice versa in determining whether the 'more than' requirement of the statute has been met so as to entitle him to a jury trial. But we think it clear that when § 11-715a states that 'the fine or penalty may be more than $300,' the words 'fine or penalty' refer only to money, and that similarly 'imprisonment' in the following phrase refers only to time and not dollars. We adhere to the ruling made in Rogers v. District of Columbia, D. C. Mun. App., 31 A. 2d 649, and hold that under the statute appellant was not entitled to a jury trial" (J.A. 58).

Preliminarily, let it be noted that this appellant did not, and does not, rely upon the right of trial by jury granted by the Sixth Amendment to the United States Constitution. Nor does he challenge the right of the District of Columbia, within the limits prescribed by the Constitution, to provide that trial shall be by a court sitting without a jury in the case of certain lesser offenses. Thus, cases such as District of Columbia v. Clawans, 300 U.S. 617 (1937) and Bailey v. United States, 69 App. D.C. 25, 98 F. 2d 306 (1938) both of which turn on a supposed constitutional right, are totally inapposite. What appellant does assert is a right granted by the District of Columbia Code to a trial by jury.

And, the plain language of the statute should grant him this right.

The statute provides, in terms, entitlement to a statutory trial by jury in cases "wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days." Since Rogers, and presumably in reliance thereon, the Municipal Court, and later the Court of General Sessions, has held to the view that ninety days and $300 does not exceed the statutory ninety days or $300. Simply to state such a proposition should be to indicate the fallacy which underlies this reasoning, for it seems indisputable that a sentence to ninety days and $300 is greater than ninety days or $300 and that, by virtue of the plain language of the statute, a jury trial should be required in such cases.

The court below held that fine or penalty referred only to money (J.A. 58) and imprisonment only to time. But such a reading really eliminates the words "or penalty" from the statute. It is an axiomatic and cardinal principle of statutory construction that "full effect" must be given "to all the words used by the Congress." Donnely v. Mavar Shrimp & Oyster Co., 190 F. 2d 409, 411 (5th Cir. 1951); United States v. Cooke, 228 F. 2d 667, 669 (9th Cir. 1955). The court's ruling implies that the words "fine" and "penalty" are synonymous. Such is, however, not the case, for while the concept of "fine" may be included within the concept of "penalty," the converse is not the case. "Penalty" is a generic term and one of far broader significance than "fine." State v. Howe Scale Co. of Illinois, 182 Mo. App. 658, 660, 166 S.W. 328, 330 (1914). It includes all punishment of whatever kind. Sayer v. Barbour, 142 Cal. App. 2d 827, 831, 300 P. 2d 187, 191 (1956). While a "fine" is always a "penalty," a "penalty" may include other forms of punishment. McHugh v. Placid Oil Co., 206 La. 511, 517, 19 So. 2d 221, 227 (1944). Necessarily, and almost by definition, where the two words are used together, some significance must be accorded to each word. Donnely v. Mavar Shrimp & Oyster Co., supra. The only way to give significance to each word is, contrary to the court's conclusion here and in Rogers, to "add days and dollars." Such a conclusion, in addition, would be in accord with common sense and understanding. Ask any person sentenced to $300 and ten days whether his "penalty" is greater

than $300. The question, itself, suggests the answer. Equally, appellant submits, does the plain reading of D. C. Code, § 11-715a, require a jury trial when the permissible punishment is both $300 and ninety days. Had the Congress so intended, it would have been very simple to add the words "or both" to the language of § 11-715a just as they were added to the galaxy of District statutes which frame permissible penalties in such language. In situations in which Congress has utilized two different concepts, as it clearly did in § 11-715a as contrasted to the criminal statute which uses the words "or both," a court should not, by interpretation, equate the two.

Appellant's first assertion, therefore, constitutes a frontal assault on the holding in Rogers and a request that this Court, apparently for the first time, interpret the jury trial provisions of D. C. Code § 11-715a and hold, as the appellant submits it must, that a trial by jury is encompassed within its terms if the defendant can receive a penalty of both $300 and ninety days. [1]

B. By virtue of D. C. Code, § 22-104.

Appellant further asserts an independent right to a jury trial, by virtue of the provisions of D. C. Code, § 22-104, which reads:

> "Every person upon his second conviction of any criminal offense punishable by fine or imprisonment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one-half longer than the maximum fine and imprisonment for the first offense."

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[1] There is no extended discussion in Rogers of the rationale behind its holding, nor does it appear that any extensive brief was prepared on the precise point. It is also of some interest to note that Rogers in the twenty-two years of its existence does not appear to have been cited for this proposition at any time until the lower court opinion in this case. And, the authority of Rogers in another area appears to have been somewhat undermined by this Court in Cephus v. United States, No. 17,712, 9/12/63.

This statute makes a second conviction for certain crimes, including the offense for which appellant was convicted, punishable by a fine or imprisonment 50 per cent greater than that called for by the basic statute. The necessary result of this is, even if the appellant was not entitled as a first offender to trial by jury under D. C. Code, § 11-715a since the penalty was not sufficiently severe, he was, as a second offender, entitled to a jury trial by virtue of D. C. Code, § 11-715a, when read in conjunction with D. C. Code, § 22-104. If the 50 per cent greater penalty applies, then necessarily in view of that penalty, the jury trial provision of the Code must be applicable.

The District of Columbia seeks to avoid the logic of this argument and what appears to be the imperative of the statute by asserting that the appellant was not charged as a second offender in the information (a fact conceded to be true); and that, consequently, he could not be given the increased penalty. The District concludes from this, since he could not be given the increased penalty, he, therefore, was not entitled to trial by jury. Brief of District of Columbia in Court of Appeals, p. 6. The District of Columbia Court of Appeals adopted this reasoning (J.A. 59).

The conclusion of both the District of Columbia and the District of Columbia Court of Appeals is founded on Jacobs v. United States, 58 App. D.C. 62, 24 F. 2d 890 (D. C. Cir. 1928). Thus, the District of Columbia said:

> "The appellant argues, however, that since he was previously convicted of a violation of the 'Baby Brokers Act,' he was entitled to a jury trial by virtue of Section 22-104, D. C. Code, 1961 which provides that
>
> > 'Every person upon his second conviction of any criminal offense punishable by fine or imprisonment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one-half longer than the maximum fine and imprisonment for the first offense.'

> "Since the appellant was not charged as a second offender under § 22-104, supra, the trial court could not, and indeed did not, impose the additional penalty provided for in that section. As stated by the court in Jacobs v. United States, 58 App. D.C. 62, 24 F. 2d 890:
>
> > 'In a case where a party is proceeded against for a second or third offense under the statute, and the sentence prescribed is different from the first by reason of its being a second or third offense, the fact thus relied on must be averred in the indictment. * * * '"
> > (Brief, supra, p. 16)

The Court of Appeals appeared to accept this reasoning for it said:

> "This case is similar to Jacobs v. United States, . . . That reasoning applies here" (J.A. 59).

In relying, as did both the District of Columbia and the District of Columbia Court of Appeals, on Jacobs v. United States, both the court below and the District of Columbia appeared to suggest that Jacobs rests on due process grounds. Such is not the fact. Jacobs and his wife were prosecuted for violation of Section 29, Title 11 of the National Prohibition Act, Act of October 28, 1919, c. 85, 41 Stat. 316.[2] That Act sets forth increased penalties for second and subsequent offenses and, by its very terms, requires such subsequent offenses to be pleaded in the indictment. Thus, the act provides:

> "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this chapter, or violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether

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[2] The text of the Act, notwithstanding repeal, is still found at 27 U.S.C. 46.

> the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. (Emphasis supplied.)

Against this background, the language in Jacobs that

> "In a case where a party is proceeded against for a second or third offense under the statute, . . . the fact thus relied on must be averred in the indictment."

is that compelled by the statute and not by any notion of due process. This Court has precisely and specifically recognized this fact. In Jackson v. United States, 95 U.S. App. D.C. 328, 330, 221 F. 2d 883, 885 (1955), fn. 2, this Court stated:

> "Jacobs v. United States, 1928, 58 App. D. C. 62, 24 F. 2d 890, dealt with a statute which required allegation and proof of a prior conviction, . . . "

The case is, thus, not "similar to Jacobs v. United States," as thought by the District of Columbia Court of Appeals. What rule, then, can be said to apply?

It is now clear that due process considerations do not require a defendant to be charged as a second offender prior to the imposition of an increased penalty. In Oyler v. Boles, 368 U. S. 448, 452 (1962), the Supreme Court held that "due process does not require advance notice that the trial on the substantive offense will be followed by an habitual criminal proceeding." Recent statutory enactments, the constitutionality of which have survived challenge, clearly suggest that one proceeded against as a multiple offender need not be apprised of that fact in the indictment. The narcotics statutes provide classic examples. 21 U. S. C. 174, 26 U. S. C. 723(a).

Moreover, in the event of trial by jury and the exercise by a defendant of his right not to testify, a clear Fifth Amendment violation would occur should an indictment or an information charging him as a multiple offender be made available to the jury during its deliberation. Jordan v.

United States District Court, 98 U. S. App. D. C. 160, 165, 233 F. 2d 362, 367 (1956), fn. 9. This was not thought to be the rule under the National Prohibition Act. See Massey v. United States, 281 Fed. 293, 298 (8th Cir. 1922).

The proper rule in this Circuit appears to be clear. It was set down in Jordan v. United States District Court, supra:

> "The Government also cites Jackson v. United States, 1955, 95 U. S. App. D. C. 328, 221 F. 2d 883. We there held that in the analogous situation where an additional penalty is sought under a statute authorizing it if the defendant has previously been convicted of a felony, the prior conviction need not be charged in the indictment. In the second offender situation, however, the criminal act which is prescribed is the same regardless of the background of the criminal; the previous offense is merely 'an historical fact,' as a result of which the penalty may appropriately be made more severe because of the demonstrated proclivities of the defendant. On the other hand, where the aggravation arises from the manner in which the crime was committed, in substance a different aspect of the offense is sought to be punished." (Footnotes omitted.)

What is present here is simply the "historical fact" of a previous offense as a result of which the defendant can receive a more serious penalty. The lower court erred in failing to recognize this and in adhering to the Jacobs rule. Under the circumstances as they exist in this jurisdiction, the possibility of the more serious penalty brings with it the right to trial by jury.

But, the District of Columbia counters, even assuming this to be correct, the trial court was never adequately apprised of the fact that the appellant was a second offender. The District of Columbia did not raise this, on Brief, in the court below. And the lower court did not in any way advert to it in its opinion. It is raised for the first time in this Court.

Brief for Appellee in Opposition to Petition for Allowance of an Appeal, p. 6. The District should not be permitted to raise such an argument at this time. It may be true that the request for a jury trial was not too artfully made, but the matter came before General Sessions Judge Malloy (J.A. 4-5) less than three pages away from his request for a trial by jury (compare J.A. 5). Under such circumstances, there was an adequate indication to the Motions Judge that the appellant was subject to a more severe penalty and that his motion for a jury trial should be considered on that basis. Moreover, the court below did not decide this case on any question of waiver for lack of notice. The court below simply took the position that, in the absence of being so charged, appellant could not be so penalized. In this, the court erred.

II. Appellant Should Not Have Been Forced to Trial on His Religious Sabbath.

When the case was called for trial on Friday, December 14, 1962, it was after 6:00 p.m. (J.A. 7). The appellant's religious Sabbath had begun.[3] When he raised this with the trial court and asked for an adjournment until Monday (J.A. 9), his request was denied (J.A. 16). Appellant submits that it was error, and violative of his constitutional rights, to be forced to trial on his day of worship.

The authorities are uniform that Sunday, at common law, was dies non juridicus. State v. Rhodes, 11 N. J. 515, 95 A. 2d 383 (1953); Housing Authority of Dallas v. Blackman, 254 S.W. 2d 548 (Tex. Civ. App. 1952); State v. Hereford, 131 W. Va. 84, 45 S.E. 2d 738 (1947); Pedersen v. Logan Square State Savings Bank, 377 Ill. 408, 36 N.E. 2d 732 (1941); Blizzard v. Blizzard, 62 Ga. App. 2d 244, 8 S.E. 2d 679 (1940); Harrison

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[3] Sundown on December 14, 1962 was at 4:47 p.m. The Washington Post, December 14, 1962. Jewish theology forbids litigation on the Sabbath. The Babylonian Talmud, Seder MO'ED, translated and edited by Rabbi I. Epstein (London, The Soncino Press, 1938), Shabbath I, 9(b), pp. 31-32. Other religions agree. Healy, Moral Guidance (Chicago, Loyola University Press, 1942), pp. 131-132.

v. Bayshore Development Company, 92 Fla. 875, 111 So. 128 (1927). Corollary to this is the rule that the Lord's day was not, at common law, a day of Court and in the absence of a statute this rule has not been abrogated. Shade v. Shade, 252 Ala. 134, 39 So. 2d 785 (1949). It has been held that a judgment rendered on Sunday is void. In re Dalton, 8 Alaska 338 (1937), a case of some significance in that Alaska at that time was in a territorial status in which federally appointed courts had jurisdiction. Only ministerial actions, those requiring no discretion, may be performed by courts on that day. Texas State Board of Dental Examiners v. Fieldsmith, 242 S.W. 2d 213 (Tex. Civ. App. 1951). While Stone v. United States, 167 U. S. 178 (1897), holds that a judgment is not void solely because a verdict was entered on a Sunday, an act which would appear to fall within the ministerial act exception in Texas State Board of Dental Examiners, supra, it specifically left open the question as to whether special issues could properly be submitted to a jury on that day. 167 U.S., at 196.

It is beyond doubt that the recognition of Sunday as dies non juridicus is religious in origin. McGowan v. Maryland, 366 U. S. 420, 431 (1961) makes that clear. It is made even more clear in Story v. Elliot, 8 Cowen 27, 28, 18 Am. Dec. 423, 424 (N.Y. 1841), where the court observed:

> "Sunday is stated in all the books to be dies non juridicus; not made so by the statute; but by a canon of the church, incorporated into the common law."

The common law of Maryland, incorporated as the law of the District of Columbia by virtue of D. C. Code, § 49-301, recognized Sunday as dies non juridicus. Sasscer v. Farmers Bank, 4 Md. 409, 420 (1853); and see 21 Maryland Law Encyclopedia, Time, § 11. Recent authorities maintain the same principal. In Commonwealth v. Cunningham, 30 D.&C. 2d 148, 150 (Pa. 1962), a case in which an information filed on Sunday was quashed, the court observed:

> "However, even in the absence of the statute, the performance of a judicial act on Sunday is forbidden by the common law. In Stern's Appeal, 64 Pa. 477, it was held that Sunday is dies non juridicus, regardless of statute, and this means that a purely judicial act cannot be performed on such a day."

If the origin of the recognition of the Sabbath as dies non juridicus arises from religion, as it does, it should be abundantly clear that the appellant, one who observes a day other than Sunday, should not be forced to violate his beliefs by being submitted to a trial on his Sabbath. The Court's attention is respectfully invited to State v. McElhinney, 88 Ohio App. 431, 100 N.E. 2d 273 (1950), a case which recognizes the common law rule, holds it not to have been adopted as part of the law of Ohio, but goes on to observe:

> " . . . we do not hold that judicial proceedings on Sunday may not be voidable as constituting an abuse of discretion on the part of the trial court. Certain judicial acts may be necessary, justifiable and legal, but on the other hand a full functioning of a court on the trial of a jury case. involving the heating of the courthouse, the attendance of the bailiff, clerk, jurors, and witnesses . . . might . . . well so outrage the conscience of the community as to constitute an abuse of discretion . . . "

One might well paraphrase the conclusion and add that it could so outrage the conscience of one of the participants as to constitute an abuse of discretion.

The court below recognized the basic principles involved when it held "we would agree at once that no man ought to be required to violate his conscientious religious scruples by submitting to trial on a day he actually observes as one of worship" (J.A. 57). But once having adopted this principle, the court erred in attempting to go behind the appellant's beliefs and practices and deciding whether he observes his Sabbath sufficiently to come within that rule. Such an inquiry is not constitutionally permissible. In McCollum v. Board of Education, 333 U.S. 203, 210

(1948), the Court clearly indicated that church attendance or non-attendance was a matter beyond the proper scope of governmental concern. And in Braunfield v. Brown, 366 U.S. 599, 609 (1961), the Court precisely stated than an "inquiry into the sincerity of the individual's religious beliefs" would raise serious constitutional issues. Yet, this is precisely what the court below sanctioned.

In the face of the appellant's uncontradicted and sworn assertion that a trial on his Sabbath would offend his conscience (J.A. 14), the trial court conducted an inquiry into Judaism in general and the specific practices of this appellant in particular. Even the "straw poll" which the trial court conducted indicated that Sabbath observance was a matter of individual conscience (J.A. 10, 12-13). Inquiry of the appellant revealed that he "not always but fairly often" (J.A. 14) went into his office on Saturdays and, on this basis, the trial court ordered him to trial and the Court of Appeals sustained that decision.

What is really involved at this point is an accomodation between his right to the unfettered exercise of his conscientious beliefs and the government's right, and indeed obligation, to insure that the courts function properly. Reduced from this abstract principle to application in this case, what must be balanced is the appellant's right to observe his Sabbath as opposed to the government's desire to have him tried on Friday evening, rather than on Monday morning. Stated in these terms, it seems hardly to admit of argument that the appellant was entitled to the adjournment which he requested.

A very close analogy is found in In re Jenison, 265 Minn. 96, 120 N.W. 2d 39 (1963), certiorari granted and case remanded 375 U.S. 14 (1963), reversed __ Minn. __, 125 N.W. 588 (1963). Mrs. Jenison was convicted of contempt for refusal to serve on a jury because of her literal belief in the Biblical admonition "Judge not lest ye be judged." Her conviction was affirmed on appeal on the grounds that the state's need of jurors outweighed her religiously based refusal to act as such. In re

Jenison, 265 Minn. 96, 120 N.W. 2d 39 (1963). On petition for certiorari, the United States Supreme Court vacated the judgment and remanded the case for further consideration "in light of Sherbert v. Verner, 374 U.S. 398." In re Jenison, 375 U.S. 14 (1963).

In Sherbert v. Verner, supra, a Seventh-day Adventist was discharged by her South Carolina employer for refusing to work on Saturday. Her claim to unemployment compensation benefits was denied. The Supreme Court held the refusal infringed upon Sherbert's First Amendment rights and then stated the problem of the case:

> "We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' Thomas v. Collins, 323 U.S. 516, 530. No such abuse or danger has been advanced in the present case. The appellees suggest no more than a possibility that the filing of a fraudulent claim by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. . . . For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." Sherbert v. Verner, supra, at 406-407.

Upon remand to the Minnesota Supreme Court, that court proceeded to this weighing process and in In re Jenison, __ Minn.__, __, 125 N.W. 2d 588, 589 (1963), concluded:

> "Upon reconsideration we have come to the conclusion there has been an inadequate showing that the state's interest in obtaining jurors requires us to override relator's right to the free exercise of her religion. Consequently, we hold that until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall henceforth be exempt."

No reasonable argument can be made for requiring a trial on Friday night. The District of Columbia asserted that such a trial was necessary because "the government's necessary witness would be returning to her home in North Carolina, beyond the jurisdiction of the Court." Brief for Appellee in Opposition to Petition for Allowance of an Appeal, p. 8. But no reason is given why this witness could not have been placed under subpoena either to require her to remain in the District of Columbia until Monday or to return here on that day. Such power quite clearly existed. See D. C. Code, § 11-755b; General Sessions Court Rule 12. The government also asserts that this was a delaying tactic; yet, no suggestion is made as to what the appellant could hope to accomplish in delaying the case between Friday and Monday. In short, the District of Columbia has advanced no reason whatever why trial had to be between 6:07 p.m. and 8:15 p.m. (J.A. 7; R. 129) on Friday night rather than on Monday morning. Under these circumstances, it was error of constitutional magnitude to force the appellant to proceed to trial.

Most assuredly, the court would not say to a Roman Catholic, whose religion frowns on Sunday labor, that he could be forced to criminal trial on Sunday because he spends some time in his office that day after church and, consequently, in the court's view, does not adequately practice his religion. A court is not, and cannot be, the arbiter of the sincerity of

religious beliefs and the adequacy of religious practices. United States v. Ballard, 322 U.S. 78, 86 (1944). This is not an area into which any branch of government may constitutionally inquire. Yet, that is what the trial court did and what the Court of Appeals sanctioned. Appellant submits that such a course of action violated the free exercise of his religious beliefs and that a trial conducted and verdict returned under such circumstances cannot stand.

III. The Statute May Not Be Construed To Impose Criminal Liability on the Appellant

Certain basic principles are clear. A statute, if possible, should be construed so as to avoid constitutional problems. Lynch v. Overholser, 369 U.S. 705, 711 (1962); Kent v. Dulles, 357 U.S. 116, 129 (1958); Sutherland, Statutory Construction (3d Ed. 1943), § 4509. Likewise, statutes which are derogatory of standard rules and which seek to impose criminal penalties for actions which hitherto had been permitted, must be strictly construed. Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). Finally, statutes which seek to impose criminal penalties must adequately describe the standard of conduct which must be met lest they be voided as being too vague. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). [4] Tested by these standards, the statute in question, D. C. Code, § § 32-781 to 32-789, may not properly be read to impose criminal liability on the appellant, a lawyer, for doing those things which, prior to the passage of this statute, could reasonably have been said to be part of a lawyer's normal function.

Appellant accepts, as far as they go, the conclusions reached by the District of Columbia Court of Appeals. See p. 2, 3, supra. Those conclusions reflect that the appellant had been contacted by a woman,

---

[4] "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonent alike with ordinary notions of fair play and the settled rules of law."

Jacqueline Zelrick, who was expecting a child, and who asked for help in placing the child for adoption (J.A. 17-18, 34-35). The only substantial variation in testimony arises at this point and is whether the appellant told Mrs. Zelrick at this time that he knew of persons who could adopt the child or whether he was later contacted by a New York couple, the Blakes, who told him that they knew the Zelrick child would be available for adoption (J.A. 19, 35, 37). In any event, at a later date, he arranged a meeting between Mrs. Zelrick and the Blakes at which time arrangements were made for the adoption of the child (J.A. 19, 38). While Mrs. Zelrick testified (J.A. 20) that the appellant was present during the discussions between herself and the Blakes, she did not testify that he, in any way, assisted in making the adoption arrangements. The appellant, on the other hand, testified, and it is uncontradicted on this record, that he advised Mrs. Zelrick of the extent to which he could assist her under the law (J.A. 35-36) and that the arrangements at the meeting were made by the persons involved (J.A. 39). His specific testimony was that "at that meeting Mrs. Zelrick and Mr. & Mrs. Blake arranged between themselves that Mrs. Zelrick would give the child for adoption to Mr. & Mrs. Blake after it was born" (J.A. 39). Subsequently thereto, the appellant did disburse money which the Blakes had provided for the care of Mrs. Zelrick and her infant child (J.A. 20, 22, 39). After the birth of the baby, he prepared adoption papers which he brought to the hospital for Mrs. Zelrick to sign (J.A. 22) and he accompanied Mrs. Zelrick and her new born child when the child was delivered to the Blakes (J.A. 21).

It is clear that the statute does not prohibit parties to an adoption from arranging among themselves for the adoption of a child. The law not only permits this, but also permits guardians or relatives within the third degree to place or assist in placing children for adoption. D. C. Code, § 32-785. The record is uncontroverted that the actual arrangement for adoption was done between Mrs. Zelrick and the Blakes. The appellant's mere presence at this meeting did not make him a party to the arrangement. Nor should the fact that the appellant prepared the

adoption papers bring him any closer to criminality, for the preparation of adoption papers is one of the things which even the District of Columbia Court of Appeals has held permissible. Goodman v. District of Columbia, 50 A. 2d 812 (D. C. Mun. App. 1947); Anderson v. District of Columbia, 154 A. 2d 719 (D. C. Mun. App. 1959). Finally, his actions as an escrow agent in making money which the Blakes had provided available to Mrs. Zelrick can hardly be said to be violative of the statute.

The appellant does not assert that the Congress could not, if it so desired, make criminal the actions of an attorney in doing anything other than representing either the adopting or the natural parents in court in adoption proceedings. Within limitations not here pertinent, control over actions of members of the Bar is within the power of the legislature. But, before Congress can be said to have made illegal and criminally punishable what has been standard practice for members of the legal profession, it must be very clear that that is what they intended to do. A lawyer's function does not begin at the courthouse door. He may prepare the papers for adoption but, equally certainly, he must be able to confer with the parties to the adoption in the preparation of those papers. The statute in question prohibits the arranging for the placement. It can hardly be said that the introduction of parties who, if they meet accidentally on the street, could transact their business, is criminal in the absence of some specific indication by the legislature. Yet, that is all the appellant has been shown to have done. Under such circumstances, appellant submits that the imposition of a criminal penalty violates his right to be advised of what the statute specifically prohibits. Neither Goodman nor Anderson put a sufficient gloss on the statute to have advised him adequately that his conduct had been made criminal, for in both those cases, the defendants had actually arranged the adoption or participated therein. In both cases, the defendants went considerably further than this appellant was shown to have gone. In Goodman, for example, the defendant "offered to talk to the prospective adopters, report to [the natural mother], and to otherwise conclude the matter for her so

that the parties would not have to meet face to face." In short, in Goodman, the defendant took it upon himself to judge the reliability of the adopting parents and the propriety of the adoption. This clearly is the evil which the statute sought to preclude. In Anderson, an adoption had previously been arranged by a co-defendant, a Mrs. Petro, who had very clearly violated the act. With full knowledge of this, Anderson came and handled the details. Being fully aware of Mrs. Petro's activities, he consented to her further activities which the opinion in that case details. While Anderson's conduct is closer to that of the appellant in this case than was Goodman's, even Anderson's conduct, judged in context, falls within that proscribed by the statute.

Appellant submits that his conduct cannot be said to violate the statute unless it is now criminal for an attorney to handle the transfer of funds from one party to another (even in an adoption proceeding) or unless it is criminal for an attorney to bring together people, already aware of each others existence, who then, among themselves, arrange for adoption. If this is criminal, then your appellant is guilty; but, before such conduct by members of the Bar can be said to be penalized, the Congress must clearly have indicated that they are barred. Congress has not done so in this case and your appellant submits that to impose criminal liability on him under these circumstances both would be to extend the literal coverage of the statute and thereby violate his rights.

CONCLUSION

For the foregoing reasons, appellant submits that the judgment of the District of Columbia Court of Appeals must be reversed and the case remanded to that Court either for further proceedings or for dismissal.

Respectfully submitted,

RAYMOND W. BERGAN
1000 Hill Building
Washington, D. C. 20006
Attorney for Appellant.

INDEX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,266

ABRAHAM DOBKIN,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal from Judgment of the
District of Columbia Court of Appeals

JOINT APPENDIX

JOINT APPENDIX

[Filed September 19, 1962]
(R. 140)

IN THE MUNICIPAL COURT
FOR THE DISTRICT OF COLUMBIA
Criminal Division

DISTRICT OF COLUMBIA	)	
	)	
v.	)	Criminal Action No. DC-27338-62
	)	
ABRAHAM DOBKIN,	)	
Defendant	)	

July Term A.D. 1962

The District of Columbia, ss.

Chester H. Gray, Esquire
Corporation Counsel
By

Clark King
Carl B. Coleman

Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here to Court, and causes the Court to be informed, and complains that Abraham Dobkin late of the District of Columbia aforesaid on to wit the eighteenth day of May and divers other days between that date and the date of filing of this information in the year A.D. Nineteen Hundred Sixty-two in the District of Columbia, aforesaid,

did then and there place or arrange, or assist in placing or arranging for the placement of a certain infant child born to Jacqueline Zelrick, in a family home, to wit, the home of Morris and Louise Blake, for adoption, the said Abraham Dobkin being then and there neither the parent, guardian or relative within the third degree of the said infant child, nor a licensed child-placing agency,

Contrary to and in violation of an Act of Congress approved April 22, 1964, in such case made and provided, and constituting a law of the District of Columbia.

CHESTER H. GRAY
Corporation Counsel

Personally appeared Dorothy A. Mizerek this seventeenth day of September, A.D.,1962, and made oath before me that the facts in the foregoing information are true, and those stated upon information received, he believes to be true.

/s/ Robert H. Campbell
Assistant Corporation Counsel
in and for the District of
Columbia

(R.142) [Filed September 27, 1962]

[Caption omitted]

MOTION FOR JURY TRIAL

Now comes the defendant, through his counsel, and moves the Court for an order granting him a jury trial and says unto the Court that pursuant to Title 11, § 616 of the D.C. Code, 1951 Edition, he is entitled to a jury trial.

[Signature line and Certificate of Service omitted]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D.C.
Friday, November 9, 1962

Motion to Quash Warrant or, in the Alternative, to Dismiss the Information in the above-entitled matter came on for a hearing before JUDGE JOHN J. MALLOY in Courtroom No. 12, Criminal Division Building, at approximately 3:50 o'clock p.m.

* * * * *

ABRAHAM DOBKIN

the defendant, was called as a witness in his own behalf and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAUGHLIN:

Q. Will you tell His Honor your full name, sir? A. Abraham Dobkin.

Q. And what is your occupation or profession? A. I'm an attorney.

Q. Are you in the active practice of law, sir? A. Yes; I am in the active practice of law. I'm a member of the bar of the District of Columbia.

Q. How long have you been a member of the bar? A. For a little over eleven years.

Q. Now, where is your office located, sir? A. In the Dupont Circle Building.

* * * * *

CROSS EXAMINATION

BY MR. KING:

* * * * *

Q. Now, with respect to the officer from the Women's Bureau by the name of Mizerek, I believe that you testified that your first contact with her was this year sometime. A. No; I did not testify that it was my first contact. I said there had been a contact with her in your office. I did not say it was my first contact.

Q. You had had a previous contact with her in December of 1960 --

A. I had a previous --

11 Q. -- did you not? A. That is correct.

Q. At which time you were convicted of this offense. A. Of this offense?

Q. I don't mean this particular charge of the offense -- that is, of this same charge but a separate offense.

MR. LAUGHLIN: Your Honor, I want to preserve my objection to this line of questioning. I realize, of course, that the witness can be interrogated about past crimes. I think there is a line of distinction though as to whether you can interrogate a witness about a municipal ordinance. I think there has been a -- I realize that the Court of Appeals has extended that, but I do want to preserve the point as to being interrogated or questioned about an offense arising under this section of the Baby Broker Law. I do want to preserve that point.

THE COURT: I don't know the purpose of this questioning. Is it on the question of credibility or just what is the purpose of it?

MR. KING: Well, I merely want to show that he had known this lady for quite some time. She wasn't somebody new to him.

THE COURT: All right.

* * * * *

14 MR. LAUGHLIN: * * *

Now, Your Honor, on the remaining motion, we are asking for a jury trial. I realize that ordinarily on this -- in an offense of this category, I assume, the defendant is not entitled to a jury trial.

MR. KING: That is our position; yes, sir. The penalty is $300 or ninety days or both.

MR. LAUGHLIN: We contend that possibly a combination of that -- say, there would be a default and failure to pay the fine -- would bring

it within that category where a defendant would be entitled to a jury trial. In other words, I believe, if I'm not mistaken, I believe that in the last couple years Judge Edgerton and Judge Bazelon had made some comments on a somewhat similar situation. So, we do want to make a request for a jury trial based on the possibility that the combination of the sentence itself and the failure to pay the fine would aggregate such a time that would bring us in the category where we would be entitled to a jury trial. So, I do want to preserve that point, too.

* * * * *

MR. LAUGHLIN: It says this: "No person other than the parent, guardian, or relative within the third degree, and no firm, corporation, association, or agency, other than a licensed child-placing agency, may place or arrange or assist in placing or arranging for the placement of a child under sixteen years of age in a family home or for adoption."

Now, we contend that there is no standard set and it hasn't been outlined for the term "may place or arrange or assist in placing or arranging." Now, in all of these categories, Your Honor, in all human endeavor, an attorney has a right to do certain things.

Now, it says here that no person other than the parent, guardian may place or arrange or assist in placing or arranging for the placement of a child under sixteen years of age. We contend that that is arbitrary and unconstitutional, since there is no standard set forth by Congress and, as far as I know, the Municipal Court of Appeals hasn't outlined just what is meant by "placing or arranging."

Now, if Mr. Dobkin did anything in this case, we contend that what he did do he had a right to do as an attorney to assist certain persons, and we want to preserve that point.

* * * * *

24 Washington, D.C.
Friday, December 14, 1962

The above-entitled matter came on for trial before JUDGE MILDRED E. REEVES in Courtroom No. 18, Criminal Division Building, at 6:07 o'clock p.m.

* * * * *

26 MR. LAUGHLIN: All right. This case was scheduled for yesterday. On Tuesday I began a very difficult case before Judge Youngdahl. I had some hope that there might be a disposition in that case. Later, if there is a further proceeding, Judge Youngdahl can testify, because there will have to be further proceedings and there will have to be a number of witnesses. It so happens that we did not make a disposition in that case. Therefore, due to other engagements, we did not resume the trial yesterday until 11:30.

I appeared in D.C. Court. Mr. King was there. He then stated that he had brought witnesses -- I believe, two from North Carolina. Well, the question came up that he would be seriously inconvenienced. I said I will be glad to accommodate him by sitting on Saturday. And we thought that would be done.

Then Mr. King called me later and said that he contacted certain judges, and I believe that you had a real estate engagement on Saturday; therefore, you could not sit.

27 THE COURT: Hardly that, but it was an engagement.

MR. LAUGHLIN: Will you let me finish? And then you can make your statement.

THE COURT: I'm not going to make any statement.

MR. LAUGHLIN: Well, I think that there will have to be testimony later. We will have to get both sides of this, because certainly -- I would certainly be a very poor lawyer if I took those threatening words from you over the telephone.

THE COURT: All right. You go ahead.

MR. LAUGHLIN: And not retract them.

THE COURT: All right. You go ahead.

MR. LAUGHLIN: All right. So, anyway, Mr. King said that he had contacted you and that you would hear it late in the evening, sit as long as necessary. Then, I said that there is a possibility I might get there at 3:30. Then I checked and I found that I had an engagement with Mr. Wilson at 4:30. We did have that. I said that I'll try to finish maybe at 5:00 and, in any event, I'll come as soon as I finish.

* * * * *

28 MR. LAUGHLIN: So, in any event, we had the conference. It did not conclude until 5:30.

Now, you have been in Washington undoubtedly some time. You know what it is to get a taxicab from 14th and F. The fact is that we could not get a cab. We came down in a bus only as far as 7th and we walked, merely because I had made the promise to Mr. King that I would accommodate him to the extent that -- since he brought these witnesses in.

Now, if I have misrepresented anything, I want Mr. King now to retract -- to correct me, because I want the record to be made of this because there will be -- there may well be later proceedings.

* * * * *

29 THE COURT: There are many witnesses here. If there is anything to be taken up, we will take it up after, but we are not going to take it up at this time. We are going into this case at this time.

30 MR. KING: Thank you, Your Honor.

THE COURT: This Court has been here since 5:00 o'clock waiting for it, and I am going to hear the case. Come on, let's go.

THE DEPUTY CLERK: All witnesses who are going to testify in the case of District of Columbia v. Abraham Dobkin, please step up.

MR. LAUGHLIN: Well, the only thing I want it understood that there was never any agreement that I would be here at 5:00 o'clock.

THE DEPUTY CLERK: (Addressing the defendant) Please, stand up.

MR. LAUGHLIN: I want that understood.

THE COURT: That is your statement. It's all right.

* * * * *

[Thereupon, five witnesses, including the defendant, were duly sworn.]

* * * * *

THE COURT: There is a motion now, Mr. King.

MR. LAUGHLIN: The Motion to Quash the Warrant and To Dismiss.

THE COURT: All right. We'll hear that.

* * * * *

MR. LAUGHLIN: Your Honor, the defendant informs me that his Sabbath begins, I believe, at sundown and in view of that his having his religious scruples, I ask then that the trial of this case be put over to another day.

THE COURT: Sorry, not at this time.

MR. LAUGHLIN: I can't hear you.

THE COURT: Not at this time. No, sir. Not after all of these witnesses have been brought in here.

MR. LAUGHLIN: Well, I don't think the mere fact that witnesses have been brought in is any answer, because if anyone attends the assignment of cases in District Court --

THE COURT: Let me see -- Mr. Gordon, Mr. Gimble, you are both of the same faith, I believe.

MR. GIMBLE: Yes, Your Honor.

MR. GORDON: Yes, Your Honor.

THE COURT: Is there any reason why it could not go on?

MR. LAUGHLIN: Oh, Your Honor, I would object to your interrogating --

THE COURT: I will certainly interrogate --

MR. LAUGHLIN: Oh, Your Honor, I think it ought to be done from the witness stand.

THE COURT: All right. Bring them up here.

MR. LAUGHLIN: Can they be sworn?

THE COURT: Come up here. Come on, Mr. Gimble or Mr. Gordon.

[Thereupon, Mr. Gimble approached the trial table.]

MR. LAUGHLIN: Mr. Gimble, yes, be sworn.

[Thereupon, the witness was duly sworn.]

THE COURT: Would you like to interrogate him?

Thereupon

GILBERT GIMBLE

having been duly sworn, took the witness stand and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAUGHLIN:

Q. Mr. Gimble,-- I understand that you are Mr. Cimble, G-i-m-b-e-l? A. G-i-m-b-l-e. First name is Gilbert.

Q. And you are Jewish? A. Yes, sir.

Q. I mean, are you the same type of Jew as Mr. Dobkin? By that I mean there are orthodox or otherwise; aren't there? A. There are varying shades of Judaism in this country; yes.

40 Q. Yes. Well, now, tell me this: In the Jewish religion does the Sabbath begin at sundown Friday? A. That is correct, sir.

Q. All right. Now, as far as the Jewish religion is concerned, are there some restrictions placed on adherence to that particular religion? A. It's up to the individual, sir.

Q. In other words, I understand that some Jews they are not supposed to perform manual labor; is that right? During the Sabbath. A. With some, that is correct.

Q. Yes. And, also, with some, aren't they required to attend religious services? A. Those who desire to do so would do so; that is correct. Religious services are held.

Q. Yes. In other words, what you may believe would not necessarily mean -- what you would believe and what you would adhere to would not necessarily be applicable to Mr. Dobkin; is that right? A. Not necessarily. It's a matter of individual conscience, as with most religions.

Q. A matter of individual conscience.

MR. LAUGHLIN: That's all.

* * * * *

41 HAROLD GORDON

having been first duly sworn, took the witness stand and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAUGHLIN:

Q. Would you state your name, please? A. My name is Harold Gordon.

Q. And you are attached to the Office of the Corporation Counsel? A. Yes; as is Mr. Gimble.

Q. I believe it's been indicated that you are Jewish. A. Yes.

Q. All right. Now, are you a certain type, orthodox or how otherwise you may describe it? I mean, are you orthodox-- there are different types of Judaism; are there not, Mr. Gordon? A. Yes; there are.

Q. All right. Now, are you -- do you practice your religion? A. I'm a Jew.

Q. Yes; I know you're a Jew. But do you go to the synagogue?

42 A. On occasion.

Q. I mean, you don't go regularly. A. No.

Q. Do you absent yourself on Yom Kippur and Rosh Hashana and such as that? A. On Yom Kippur I usually attend.

Q. Tell me this: Do you eat ham? A. Yes.

Q. All right. Now, let me ask you this -- A. Rather enjoy it --

Q. -- in some Jews, isn't it true that -- no; first, let me ask you this: As far as the Jews are concerned, the Sabbath begins at sundown Friday; doesn't it? A. I don't know if I'm qualified to answer that, sir. I have never been confirmed.

Q. Never been confirmed? A. No.

Q. Oh, I see. Then, you would say you are not a full-fledged Jew. A. I am of the Jewish faith, but I am certainly not an expert witness on Judaism.

Q. Oh, I see. In other words, you couldn't say -- now, with some Jews, isn't it true, Mr. Gordon, that they will absent themselves from manual labor on the Sabbath? A. This was never the case in my own family.

43 Q. Well -- A. I can testify only --

Q. You've talked to rabbis; haven't you? A. Not about this.

Q. Well, isn't it true that some Jews do not do manual work on Saturday? A. I don't know, sir. I'm not an expert.

Q. Oh, you couldn't say one way or the other.

MR. LAUGHLIN: All right. I believe that's all.

* * * * *

44 SAMUEL B. GRONER

having been first duly sworn, took the witness stand and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAUGHLIN:

Q. Now, may I have your full name, sir? A. Samuel B. Groner.

Q. Are you connected with the Corporation Counsel's office, also? A. I'm a practicing attorney. I'm not connected with the Corporation Counsel's office.

Q. Now, I take it you are Jewish? A. I am Jewish.

Q. All right. Now, are you an orthodox Jew? A. Conservative.

Q. What is the difference between the two? A. There are three branches of Judaism. The orthodox are most observant of traditional rites.

45 Q. All right. Now, at that point, what are the traditional rites? A. With respect to the issue here involved, obviously, it's observance of the Sabbath, which does begin at sundown Friday night and runs through sundown Saturday.

Q. And those who practice that faithfully would perform no manual labor on the Sabbath? A. Certainly not.

Q. And would not go to places of amusement? A. No. No.

Q. In other words, what -- would they spend the time in the synagogue? A. They would spend the time in the synagogue and study. They would not even light a cigarette or turn on electricity or cook.

Q. And would you say what you've described to us, sir, represents a considerable part of Judaism -- I mean, of the Jewish population in this country? A. Yes.

Q. It does. A. I should think so. I don't know the population figure.

Q. All right. Then, do you yourself observe Yom Kippur and Rosh Hashana? A. Yes; certainly.

46 Q. And do you eat ham? A. No.

Q. You don't eat ham.

MR. LAUGHLIN: All right. That's all.

* * * * *

ABRAHAM DOBKIN

the defendant, having been previously duly sworn, took the witness stand and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAUGHLIN:

Q. State your name, please. A. Abraham Dobkin.

Q. And, Mr. Dobkin, you are the defendant in this case. Now, are you Jewish? A. Yes; I am.

Q. All right. Now, what type of Jew are you, if that's the proper term to use? A. I belong to the liberal -- the liberal part of the religion as it is now called. Formerly called reformed.

Q. All right. Now, tell us something of the tenets and the requirements of your branch of Judaism. A. Again, as the first witness

47 on this matter testified, it is mostly a matter of individual conscience. There are many people, many members of my particular branch of Judaism, who will perform manual labor on Saturday and who will go to places of amusement and do other things. There are also a -- well, there is also a large group, to which I belong, which modifies this. There are some things that I will do and I feel that I can do not

only on the Sabbath but during the year and other things which I can only say I permit myself to do.

Q. Well, will you tell us what you can do and what you can't do? A. For one thing, I go to religious services not every week but a good number of times during the year. I observe not only the high holidays of Rosh Hashana and Yom Kippur but also the Passover and what is known as the Festival of Lights and several other lesser known religious holy days. I do not eat the foods that are forbidden in the Chapter of Leviticus which, of course, are hard-shell seafoods and other things that are mentioned there. I feel personally -- and my objection to being tried is that I feel that on my Sabbath I should not be tried any more than a person of -- than a Moslem should be tried on a Friday or an adherent of Christianity should be tried on Sunday.

Q. Now, do you abstain from manual labor on the Sabbath?

48 A. No; I abstain -- well, I abstain from manual labor generally, but I don't abstain from mental labor. I do go to my office not always but fairly often on Saturday.

Q. Well, then, tell me this so Her Honor can determine this: Being tried now on the Sabbath, since it began at sundown, in what manner would you run counter to your religious beliefs if you were tried on the Sabbath? A. Well, for one thing, although I have taken the oath, I object to taking an oath on the Sabbath. That's the first thing. And, now, that I have taken it, of course, I am bound by it.

Another thing is that I feel that on my Sabbath I should not be placed in the position that a defendant in a criminal case is placed any more than any other person should be placed in such a position on his own Sabbath. We don't have trials of criminal cases on Sunday in this country. Mostly because the majority, the vast majority of the population is Christian. Sunday is the Christian Sabbath and there are just a number of things that aren't done on a Sunday, and I don't think that these things that are not done on Sunday should be done to me on my Sabbath.

Q. Would -- does it offend your conscience? A. That's what I'm trying to say, that it does offend my conscience.

Q. To be tried on the Sabbath? A. I have no objection to being
49 tried, but I do have an objection to being tried on the Sabbath.

MR. LAUGHLIN: Mr. King, do you want to examine him?

CROSS EXAMINATION

BY MR. KING:

Q. You feel that it is perfectly proper to carry on your business on the Sabbath; is that it? A. I'm sorry, Mr. King.

Q. You feel that it is perfectly proper to carry on a business on the Sabbath but you shouldn't testify in court on the Sabbath; is that it? A. I would have to say "yes" to that question.

Q. Do you feel then that a person that you refer to as Christian, not being tried on Sunday -- do you feel that Christians object to being tried on Christmas Day? A. Most certainly.

Q. Do we not have court here on Christmas Day? A. Not to my knowledge.

Q. Well, we do, for your information.

MR. LAUGHLIN: Court on Christmas?

MR. KING: Yes, sir. I have no further questions.

MR. LAUGHLIN: I have no further questions.

THE COURT: Let me ask one question.

BY THE COURT:

50 Q. When did you first advise Mr. Laughlin that you objected -- A. I advised him this evening because I was aware of this --

Q. And you advised him after he got here in court? A. After he got here, Your Honor.

Q. All right. A. Let me explain that?

Q. Yes. Go ahead. A. At the time Mr. Laughlin advised me of this, which was just about twenty-five hours ago, it did not occur to me that it was going to be Friday night and at this time. Late this afternoon I realized what the time would be and that it would run on after sundown. I came down expecting to find Mr. Laughlin here, because I

had anticipated that sometime around 5:00 o'clock he would be here and I informed Mr. Laughlin of this as soon as I saw him.

Q. You are aware that sundown occurs before 5:00 o'clock this time of the year; are you not? You are a practicing member of the Jewish faith and do go to church. It seems to me you would have been aware of the fact that it was necessary for you to be here before sundown.

A. No; the services --

THE COURT: The Court is going to deny the motion. I think it is something to delay this.

* * * * *

51 EVIDENCE ON BEHALF OF THE GOVERNMENT

Thereupon

JACQUELINE ZELRICK

was called as a witness for and on behalf of the Government, and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KING:

Q. Keep your voice up so that we may all hear what you have to say. State your name, please. A. Mrs. Jacqueline Zelrick.

* * * * *

Q. You are presently residing where? A. 401 East Academy

52 Street, Cherryville, North Carolina.

Q. Do you recognize the defendant here? A. Yes; I do.

Q. Will you relate for us approximately when and where you first had any contact with the defendant? A. (Pause) -- Would you please repeat that?

Q. Would you tell us when and where you first had any contact with the defendant? Approximately. A. (Pause) -- February or March.

Q. Of what year? A. '61.

Q. And can you tell us -- A. -- just --

Q. Excuse me. A. '62.

Q. '62. Can you tell us how you happened to come in contact with the defendant? A. Based on a conversation with --

* * * * *

53 Q. Based on a conversation, you did what? A. (Pause) -- I made a telephone call.

Q. To whom? A. Mr. Dobkins.

Q. And what was that telephone conversation? A. Concerning adoption of the baby.

Q. What did you say to him and what did he say to you? A. I told him that I wanted to put the baby up for adoption. And he said he knew
54 of some people in New York and that he would call me in a few days.

Q. And was that the telephone conversation? A. Yes.

Q. And did you go to his office? A. Not then.

Q. Did there come a time when you did? A. Yes, sir.

Q. And how soon after that would you say it was that you actually went to his office? A. Around February or March.

Q. And were you accompanied by anyone? A. This girl friend of mine showed me his office.

Q. And how did you get there? A. A friend of hers.

Q. Have you seen him here today? A. Yes, sir.

Q. Is he in the witness room? A. Yes, sir.

Q. And what did he do? A. He stayed --

Q. Not what he stated -- A. -- in the car as far as the --

Q. Not what he stated; what did he do? A. Repeat that, please.

55 Q. What did he do? You said that you went with him. But what did he do? How did you go there? Walk or -- A. By car.

Q. Huh? A. By car.

Q. Whose car? A. Mr. Louie Hines.

Q. That's the person you're speaking of? A. Yes, sir.

* * * * *

Q. At any rate, you went to his office. Do you remember about what time that was? A. It was after midnight.

56 Q. And when you went to his office, did you go alone into his office or did either one or both of these other people go with you? A. No. This friend showed me his office.

Q. And then what did you do? A. I talked about --

Q. Well, did you go in? I'm trying to find out, first of all, did you go in by yourself or did one of these other people go with you or did both of them go in the office with you? A. Only the girl -- the friend of mine went in the office with me.

Q. She went in the office with you? A. I don't remember if she went in the office or stayed at the door.

Q. But she went at least to the office. A. She showed me the office; yes.

Q. And did there come a time then when you actually saw Mr. Dobkin in the office? A. Yes, sir.

Q. All right. Suppose you tell us what, if any, conversation that you had with Mr. Dobkin in the office? A. I told him about I wanted to put my baby up for adoption. He asked me why didn't I go to the Welfare. I said I wanted my baby to be placed in a home right away. I was afraid
57 it would be in an orphanage. And he said he knew of some people in New York, some Jewish people -- (pause) -- and he would get in contact with me.

Q. Now, was there anything else said at that time? A. (Pause) -- Not that I can remember.

Q. All right. Then, did you then thereafter leave? A. This friend -- she came in the office --

Q. Yes. A. -- after I had been in there awhile and then we left.

Q. Well, was there any conversation or discussion as to who would contact who thereafter? A. Yes.

Q. What was that? A. He would contact me about these people that were to adopt the baby.

Q. And thereafter did you leave? A. Yes.

Q. And did there come a time when he did contact you? A. Yes.

Q. And what was that -- how was that done and what was said? A. He called --

Q. By telephone you mean? A. Yes. -- my upstairs neighbor. He had asked me for a telephone number.

58 Q. That's when you were at the office you mean? A. And I had given it to him.

Q. When you were at his office? A. (Pause)

Q. You said he had asked you for a telephone number. I'm trying to find out: Did he ask you for that while you were at his office or did he contact you some other time and ask you for it? A. At the office.

Q. At the office. And then you say he called this upstairs neighbor. Then what happened? A. He told me that -- the defendant told me that --

Q. That what? A. The defendant told me -- Mr. Dobkins --

Q. Yes. Told you what? A. Told me that this Buddy and Louise that were to adopt the baby would be in town.

Q. Did he tell you the names were Buddy and Louise at that time? A. No, sir.

Q. You mean you learned that later? A. Yes, sir.

Q. What did he tell you at that time? A. (Pause) -- He told me they would be in town and they would fly in from New York.

59 Q. Yes. A. And -- (pause) --

Q. Were you to meet? A. Yes, sir.

Q. Where? A. (Pause) -- I wanted him to come to my home because I had my three small children there.

Q. Yes. A. And he suggested meeting me someplace. So,we planned on meeting at the Fairfax Village Drugstore at 7:00 o'clock.

Q. Did you go there? A. Yes; I did.

Q. Did you see him thereafter? A. Well, he come in around 7:30.

Q. In the drugstore? A. Yes, sir.

Q. All right. Was he by himself at that time? A. Yes, sir.

Q. All right. Then what happened? A. He took me out to the parking lot to a car and he opened the door. I got in and he introduced me to Buddy and Louise.

Q. And did you learn what their last names were? A. No, sir.

60 Q. What did he say when -- he just said, "Buddy and Louise." Is that all he said? A. He said that it would be best that I didn't know the last name.

Q. Then what happened? A. We went out to Marlow Heights Shopping Center.

Q. Is that out in Prince Georges County, you mean? A. Yes.

Q. Yes. A. Mr. Dobkins stated that -- go out for supper because Buddy and Louise hadn't had their dinner yet on the plane. So, we went to Marlow Heights. They had dinner and they were telling me that they weren't able to have children and that they assured me that they would take care of the baby, and I told them that I had had my own doctor -- Dr. Price.

Q. Is that Dr. Price? A. Yes. So, they took me back to Coral Hills and I got out on the corner there at Coral Hills because I had to go in the drugstore.

Q. Was anything said then with respect to how they were to get the baby or how any of this matter would be carried out? A. Yes. They were to come to the hospital when the baby came.

61 Q. Anything said about money? A. They said that if I needed anything, I was to contact Mr. Dobkins.

Q. Contact Mr. Dobkin? A. Yes.

Q. Thereafter, did Mr. Dobkin do anything with respect to your needs? A. Yes.

Q. What was that? A. When my rent was due -- (pause) --

Q. What happened? A. Mr. Dobkins would bring a check out made out in my name.

Q. In what amount? A. A hundred dollars.

Q. And how much was your rent? A. Seventy-five a month.

Q. What was the other twenty-five for? A. I bought food.

Q. How many times would you say he did that? A. I don't remember. I guess it was about four to six hundred dollars altogether.

Q. And did there come a time when you again saw Mr. Dobkin? A. Yes, sir.

Q. When was that? A. I received a letter from Dr. Price.

* * * * *

Q. Was that before or after you had the baby? A. After.

Q. What happened during the time that you had the -- or were at the hospital? A. (Pause) -- He asked me to call him when the baby came.

Q. Yes. Did you? A. Yes, sir.

Q. And then what happened? A. He came to the hospital and brought me flowers.

Q. Yes.

MR. LAUGHLIN: When she says, "he," does she mean Mr. Dobkin?

BY MR. KING:

Q. When you say, "he," do you refer to Mr. Dobkin? That he came to the hospital? A. Yes.

Q. And that he brought you flowers -- Mr. Dobkin brought you flowers? A. Yes, sir.

63 Q. All right. And then what happened? A. (Pause) -- Buddy and Louise came to the hospital with Mr. Dobkins.

Q. Was that the same time he brought the flowers or was that another time after that? A. After.

Q. After. And then what happened? A. They came to the hospital the night before I was released.

Q. When you say, "they," you are referring to Mr. Dobkin and the persons known to you as Buddy and Louise? A. Yes, sir.

Q. What happened? A. They were discussing the baby -- (pause) -- and made plans to take me home from the hospital the next morning.

Q. Yes. Then what happened the next morning? A. They came to the hospital.

Q. When you say, "they," whom do you mean by "they"? A. Mr. Dobkins, Buddy and Louise.

Q. All right. A. (Pause) -- I got in the wheelchair with the baby -- (pause) -- went down to the parking lot -- (pause) -- got in the car -- (pause) -- I got in front with the baby and Mr. Dobkins.

64 Q. Mr. Dobkin driving? A. Yes, sir. (Pause) -- We drove out

a street. I don't remember the street number. Mr. Dobkins stated that Buddy and Louise had to catch a plane back to New York and would I mind riding home in a cab. So, he stopped the car and hailed a cab.

Q. Do you know about where that was? A. No, sir.

Q. Was it here in Washington or some other place? A. It was in Washington.

Q. All right. A. (Pause.)

Q. Then what happened? A. (Pause) -- I went home -- (pause) -- picked up my three children, went to the apartment.

Q. Who were the children with? A. A baby sitter.

Q. Who paid her? A. Mr. Dobkins did.

Q. Do you know how much he paid her? A. Forty dollars.

Q. And then what? A. Pardon?

Q. And then what? You picked up the children and then you did what? You went home?

65 * * * * *

A. I took care of the children after that.

Q. I mean, did you go back to your own home after that? A. 1147 Forty-sixth Street, Southeast.

Q. Here in Washington? A. Yes.

Q. The child was born in what hospital? A. Sibley.

Q. Here in Washington? A. Yes, sir.

Q. And did you thereafter have any further contact with Mr. Dobkin? A. (pause) -- He told me that if anything --

Q. When you say, "he," you are referring to Mr. Dobkin? A. Mr. Dobkins. If anything come up about the baby to contact him.

Q. Up to that time had you signed any papers with respect to this baby? A. Yes, sir.

Q. Where were they signed? A. In the hospital.

Q. Who presented them to you? A. Mr. Dobkins.

66 Q. Do you know what you were signing? A. (Pause.)

Q. Or were you told what you were signing? A. Adoption papers.

Q. All right. And after Mr. Dobkin told you that if anything came up about the baby to get hold of him, what then happened, if anything? A. Please repeat that.

Q. I say, after Mr. Dobkin had told you that if anything came up about the baby to get in touch with him, what then happened? A. I received a letter from Dr. Price.

Q. And as a result of that letter, what did you do? A. I called Mr. Dobkins.

Q. And Dr. Price was the doctor who delivered the baby? A. Yes, sir.

Q. By the way, on what day was the baby born? A. May 18.

Q. Of 1962? A. Yes, sir.

Q. Now, after you showed the letter to Mr. Dobkin, then what did you people do? A. The letter stated that I was to see Dr. Price with Mr. Zelrick and -- (pause) --

67 Q. At that time were you separated from Mr. Zelrick? A. Yes, sir.

Q. Did Mr. Zelrick -- did you contact Mr. Zelrick? A. Mr. Dobkins said that we would go pick him up and go to -- I mean, go to Dr. Price's office together. After we got to the W.M. and A. Transit garage, he stated that he didn't want to bother Mr. Zelrick and asked me to call Dr. Price and to make an appointment for another day.

Q. Did you do that? A. Yes, sir.

Q. Did you make this appointment? A. Yes, sir.

Q. Did you then go on that date? A. Yes, sir.

Q. Did Mr. Dobkin go with you then or your husband or both, or what? A. Mr. Dobkins.

Q. Did your husband come on that day? A. No, sir.

Q. Did you go by to get him? A. No, sir.

Q. Did you ask Mr. Dobkin why? A. No, sir.

Q. Was anything said about picking up your husband on the second

68 occasion? A. No, sir.

Q. Now, when you got to Dr. Price's office, what took place

there then with Mr. Dobkin? A. Mr. Dobkin assured Dr. Price -- (pause) -- well, I hadn't told Dr. Price that the baby was put up for adoption. I didn't do very much talking myself. Mr. Dobkins talked with Dr. Price.

Q. What did he tell Dr. Price? A. Told Dr. Price that he represented Buddy and Louise and that the baby was in the best of health and he was having a breezy summer in the country.

Q. Anything else? A. (Pause) -- He gave Dr. Price his card.

Q. Remember any other conversation with Dr. Price? A. (Pause) -- Not that I can remember.

Q. Did you have any further contact with Mr. Dobkin after that? A. (Pause) -- When my rent was due.

Q. After that? A. Yes. He came out, brought out a check once after that.

THE COURT: I didn't hear the rest of that answer. He brought out a check and what?

THE WITNESS: He brought a check out --

69 THE COURT: For the rent?

THE WITNESS: For the rent and the food.

THE COURT: I see. Thank you.

BY MR. KING:

Q. Was that also a hundred dollar check? A. Yes, sir.

Q. Did you see him any more after that or have any further contact with him after that? A. No, sir.

MR. KING: You may examine.

CROSS EXAMINATION

BY MR. LAUGHLIN:

Q. Miss Witness, your husband was agreeable to the adoption; was he? A. My husband stated that --

Q. What's that? A. Yes.

Q. In other words, he consented to the adoption? A. Yes.

Q. And when did you first tell him, your husband, that you were

going to have the baby adopted? A. When I first -- when I decided. In November.

Q. And have you had any other children adopted, Miss? A. No, sir.

Q. Is this the first one? How many do you have? A. Three.

70 Q. And are you living with your husband at the present time? A. No, sir.

Q. Well, where is your husband? A. D. C.

Q. And where are you? A. North Carolina.

Q. And you've separated from him; have you? A. Yes, sir.

Q. You're not divorced though; are you? A. No, sir.

Q. Now, Miss, how much did you pay Mr. Dobkin all told? A. Pardon?

Q. How much money did you pay -- I mean, how much money did you receive all told? You mentioned some -- couple of rent checks and -- how much altogether? A. Approximately four to six hundred dollars.

Q. Now, of course, Mr. Dobkin said that he was really acting for this client; didn't he? He said he was acting for -- A. Repeat that.

Q. -- some client of his; didn't he? He told you he wasn't a broker; didn't he, that he was acting for his client in New York; he told

71 you that; didn't he, Miss? A. I understood that he was to contact these people and put my baby for adoption.

Q. Well, in other words, he was representing these people; isn't that right, Miss? A. (Pause.)

Q. In other words, he didn't want the baby in his own home; he was doing it for some people in New York; isn't that right? A. He was putting the baby up for adoption for me to these people in New York.

Q. Yes. And you were agreeable to surrendering your baby. A. Yes; I was.

Q. And you haven't seen the baby since. A. No, sir.

Q. Was it a boy or a girl? A. Boy.

Q. Now, Miss, weren't you mistaken -- I think you said you went

to Mr. Dobkin's office after midnight. You mean after midday -- after noon; don't you? A. After midnight.

Q. Midnight? What time? How much after midnight? A. When Mr. Hines was off duty.

Q. And you went -- you say you went to Mr. Dobkin's office after
72 midnight. A. Yes, sir.

Q. And where was that office? A. I don't remember the address.

Q. And you didn't know Mr. Dobkin before this; is that right, Miss? A. Only by conversation on the telephone.

* * * * *

Q. Miss, isn't it true that before Christmas of last year -- about a year ago, a little more than a year ago -- didn't you yourself contact Mr. Dobkin? A. Yes, sir.

Q. And will you tell us why you contacted him at that time? A. To put the baby up for adoption.

Q. And, now, how -- what was the extent of your pregnancy at that time? A. The baby was born in May.

Q. When you contacted him, how far pregnant were you, Miss? How many months? A. (Pause) Around six months.

Q. And this baby, I take it, was by your husband; wasn't it?
73 A. No, sir.

* * * * *

Q. Miss, what was it that Mr. Dobkin told you in December when you called him? A. I was in Carolina in December.

Q. Well, anyway, you contacted him sometime before Christmas; isn't that right? A. November, I believe.

Q. All right. In November. What was it he told you at that time? A. That he would get in contact with me.

Q. Well, didn't he tell you at that time that he couldn't handle it; he wasn't a broker, and he had nothing to do with any adoptions? A. He told me he thought he knew of some people in New York.

MR. LAUGHLIN: I believe that's all, Your Honor.

MR. KING: You may step down.

* * * * *

74 LOUIS C. HINES

was called as a witness for and on behalf of the Government and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KING:

Q. State your name, Officer. A. Louis C. Hines, private, Metropolitan Police Department.

Q. Do you recognize the defendant here? A. Yes, sir.

Q. Do you know the witness who just testified, Mrs. Zelrick? A. I know of her; yes.

Q. Did you have occasion to take her to the office of the defendant? A. Yes, sir.

Q. Will you tell us about when that was and who it was that went on that occasion? A. It was either sometime in February or in March.

Q. And who was it that went? A. This Nancy Wade and the young lady back there, Mrs. Zelrick, and myself. I furnished the transportation.

Q. And how did you happen to go? A. I was asked by Mrs. Wade

75 if I would accommodate her and Mrs. Zelrick by taking them down there.

Q. Did you at that time know for what reason they were going? A. Only that he was an attorney and was supposed to be some arrangement about adoption.

Q. Can you tell us what time that was? I mean by that, the time of the day or night. A. It was after midnight.

Q. And where was it? A. Well, I don't know the exact address. It's down in the Northwest section.

Q. Do you know in what immediate area? A. I believe up near Connecticut Avenue.

MR. KING: You may examine.

CROSS EXAMINATION

BY MR. LAUGHLIN:

Q. Are you a member of the Metropolitan Police Department

now? A. Yes, sir.

Q. In what department? A. What department?

Q. Yes. I mean, what branch of the -- what I mean is what squad.

A. What squad?

76 Q. Yes. A. I'm in the Fifth Precinct with the scout car.

Q. Now, you mentioned a Nancy Wade. Who is Nancy Wade?

A. It's a girl friend of hers.

Q. And also a friend of yours; isn't she? A. Was; yes.

Q. You knew her quite well; didn't you? A. I knew her; yes.

Q. I believe that -- yes -- you were very, very friendly with her; weren't you? A. Well, I'd say as a friend; yes.

* * * * *

77 Q. Now, Officer, I'll ask you this: Just how did you happen to go to Mr. Dobkin's office? A. I don't quite understand what you mean by that, sir.

Q. Well, you went to Mr. Dobkin's office; didn't you? Did you ever go to his office? A. Only on that one occasion.

Q. All right. Now, tell me how you happened to go there at that time. A. I explained before, that I was asked by Mrs. Wade if I would accommodate her and her girl friend by furnishing transportation to take them down to the office.

78 Q. Well, how did -- can you give us any reason why she made that request of you, Officer? A. Well, no particular reason. It's just like if I would ask you as a favor to take somebody down to the train.

MR. LAUGHLIN: That's all, Your Honor.

MR. KING: That's all, Mr. Officer.

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DR. JOHN W. PRICE

was called as a witness for and on behalf of the Government and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KING:

Q. State your name, Doctor. A. John W. Price.

Q. And you are a practicing M. D.? A. Yes.

Q. And how long have you been so engaged? A. I've been in the private practice of medicine since the first of July 1947.

Q. Do you know Mrs. Zelrick? A. Yes.

Q. Have you had occasion to see Mr. Dobkin here? A. Yes.

79 Q. Will you tell us whether or not you had occasion to deliver a baby for Mrs. Zelrick on May 18 of this year? A. I did.

Q. When were you engaged for that purpose? A. I can give you the exact date -- (referring to notes) -- February 15.

Q. And did you continue to supervise or advise from a medical point of view Mrs. Zelrick up to the time of the birth of the child? A. Yes. She made approximately four or five prenatal visits up to May 18.

Q. And thereafter the child was born on the 18th. A. Yes, sir.

Q. Now, did there come a time when you had occasion to talk to Mr. Dobkin? A. Yes. I talked to Mr. Dobkin on the 12th of July.

Q. Will you tell us what transpired that led up to that? A. Well, about a month after the baby was born, one of the nurses on the floor was asking me about this particular patient and she said that the hospital received several reports that the baby had died of a heart condition. And I became concerned because the baby's health was good when it left the hospital. So, I tried to get in touch with Mrs. Zelrick. I

80 telephoned her and she didn't have a telephone. I called her neighbor and asked the neighbor to have her call me. But she never called. So, a few days later I wrote her a note and told her that I would like to see her to get these discrepancies in the story straightened out. And I did not hear anything from her until the afternoon of July 12 when she and Mr. Dobkin came to my office.

Q. And at that time will you relate for us the conversation that took place on the part of Mr. Dobkin and her in your and Mr. Dobkin's presence? A. Mr. Dobkin explained to me that Mr. and Mrs. Zelrick were having some difficulties in their marital relationships and they decided that this baby couldn't be supported by them and they were going to put it up for adoption and he was representing Mrs. Zelrick and that

he was -- the baby had already been in New York. The baby had been placed in New York and that Mrs. Zelrick would have to appear before the Surrogate in November of this year in New York to make this adoption procedure legal. Mrs. Zelrick didn't have too much to say. She apologized for not having informed me that the baby was going to be adopted. And they left the office.

Q. Now, Doctor, can you tell us whether or not any other examination was made of this baby by any other doctor? A. Yes. While the baby was in the hospital, I noticed one day on the chart that Dr.

81 Michaels had come to the hospital to examine the baby and I had not been informed of his visit. * * *

* * * * *

Q. Did there come a time when you mentioned this to Mr. Dobkin? A. What's that?

Q. Did you mention this to Mr. Dobkin, about this Dr. Michaels being there? A. No; I didn't.

MR. KING: I have no further questions.

CROSS EXAMINATION

BY MR. LAUGHLIN:

Q. Doctor, are you certain that Mr. Dobkin told you he was representing Mrs. Zelrick? Are you certain he said that? A. Yes.

Q. He did not say that he was representing some people in New York? A. No.

82 Q. But you have a vivid recollection he said he was representing Mrs. Zelrick. A. Yes.

MR. LAUGHLIN: That's all I have.

REDIRECT EXAMINATION

BY MR. KING:

Q. By the way, Doctor -- I overlooked one thing -- did he give you one of his cards? A. Yes; he did.

* * * * *

Q. Do you have that? A. Yes.

Q. Could I have it, please?

[The witness hands the card to counsel.]

[Mr. King hands the card to Mr. Laughlin. Pause.]

MR. LAUGHLIN: I understand this was given to you by Mr. Dobkin?

THE WITNESS: It was.

MR. LAUGHLIN: Is that right, Doctor?

THE WITNESS: Yes, sir.

83 BY MR. KING:

Q. And that was at the time when he accompanied Mrs. Zelrick to your office? A. Yes, sir.

MR. KING: I would like to offer this, Your Honor. Do you have any objection?

MR. LAUGHLIN: No; I have no objection.

THE COURT: The Court will receive it.

(The card referred to was received in evidence as Government's Exhibit 1.)

MR. KING: That's all, Doctor. Your Honor, may the Doctor be excused?

* * * * *

84 MRS. MIZEREK

was called as a witness for and on behalf of the Government and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KING:

Q. Mrs. Mizerek, inviting your attention to the early part of September of this year, did you have occasion to be present in my office at the time when Mr. Dobkin appeared and made a statement regarding the adoption, the placement of a child born to Mrs. Zelrick? A. I was.

* * * * *

85 Q. All right. Then, will you relate for us what Mr. Dobkin said with regard to the placement of the Zelrick baby at that time?

THE COURT: Keep your voice up. Mr. Laughlin may have trouble hearing you.

THE WITNESS: Mr. Dobkin told us that he was contacted by Mrs. Zelrick in the early part of her pregnancy and at that time he advised her that there was nothing that he could do for her and referred her to several agencies but that if she herself found someone to adopt the baby that he perhaps could handle the legal matters for her; and then he was again contacted by her approximately March or April when she was in seventh or eighth month, and he again told her that he didn't think that he could help her; she should go to an agency, but again that if someone could -- if she met someone that wanted to adopt the child, he'd handle the proceedings for her; and sometime after that he received a call from a man by the name of Blake in New York that told him that he had heard of a girl down here in Washington who wanted to place a child for adoption and it turned out that this woman that wanted to place a child for adoption was the same Mrs. Zelrick who had contacted him earlier and that at that time then he was not acting on behalf of Mrs. Zelrick but on behalf of the people by the name of Blake -- their first names, I believe, were Buddy and Louise -- and that they were to come

86 to Washington and they wanted him to arrange a meeting with Mrs. Zelrick so that they could discuss this matter, and he got in touch with Mrs. Zelrick and it was decided that they would meet her in Fairfax Village and -- in order for all of them to discuss this matter together, and they met her there and then they went over into Marlow Heights to have dinner and discuss the matter of the adoption and then they told him to act on their behalf and to see that her children were taken care of and that she didn't want for anything, and after that he proceeded to assist her financially through the Blakes whenever she needed something and the money coming from the Blakes.

BY MR. KING:

Q. Did he make any statements with respect to any arrangement for a doctor to examine the baby? A. He told us that the Blakes had contacted a Dr. Wattel in New York, who was their family doctor, and he in turn calle a Dr. Paul in Langley Park to assure them that this child was all right. And, because, Dr. Paul was in Maryland and didn't

want to make the trip to the hospital, he called a Dr. Michaels to go and check the baby out.

MR. KING: You may examine.

CROSS EXAMINATION

BY MR. LAUGHLIN:

Q. Miss, when is the first time you talked to Miss Zelrick --

87 Mrs. Zelrick? When is the first time you talked to her? A. When is the first time I talked to her?

Q. Yes. A. This same day, August 3.

Q. Had you had any contact with the case prior to that time? A. The information that was given to us by the Welfare Department.

Q. When was that? When was that, Miss? A. This was -- (pause) -- perhaps several weeks before this; I'm not certain.

MR. LAUGHLIN: That's all, Your Honor.

MR. KING: You may step down.

(The witness left the stand.)

MR. KING: That is the Government's case, Your Honor. Oh, one thing -- I'm sorry -- one thing I did forget. I think we can all agree that he does not have a license to place children.

MR. LAUGHLIN: (Addressing the defendant) Will you state, sir, that you do not have a -- are you willing to concede that?

THE DEFENDANT: Yes.

MR. LAUGHLIN: Yes; he states that he has not.

MR. KING: All right. We rest, Your Honor.

88 EVIDENCE ON BEHALF OF THE DEFENDANT

MR. LAUGHLIN: Will you take the stand.

Thereupon

ABRAHAM DOBKIN,

the defendant, was called as a witness in his own behalf and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAUGHLIN:

Q. Mr. Dobkin, keep your voice up now so that we can all hear

you. Your full name, sir? A. Abraham Dobkin.

Q. And you're -- what's your profession? A. I'm an attorney.

Q. And how long have you been an attorney? A. I was (pause) -- eleven years.

Q. Are you a member of the bar of any courts in the District? A. I'm a member of the bar of the District.

Q. And what other courts? Arlington? A. No.

Q. Well, all right. What other -- A. Supreme Court.

Q. I mean, any other courts, other than the District? A. And the Supreme Court.

Q. Supreme Court of the United States? A. Supreme Court of
89 the United States.

Q. What is your practice generally, Mr. Dobkin? Do you specialize -- are you confined to a certain field of -- in the law or is it a general practice? A. It's a general practice.

Q. All right. Now, Mr. Defendant, you heard the lady testify that she came to your office after midnight. Were you in the office at that late hour? A. I was in the office at that late hour.

Q. All right. What generally are your hours at your office, sir? A. My hours are generally from ten to six or seven o'clock.

Q. Ten to what? A. Ten o'clock in the morning to six or seven o'clock in the evening.

Q. Oh, all right. And this was an unusual case; is that right? A. She had asked me to wait for her --

Q. All right. A. -- as a result of a conversation.

Q. Now, you heard the testimony here of these witnesses -- first, Mrs. Zelrick. Tell us the circumstances under which she contacted you or you contacted her, what was said or done. A. Sometime to-
90 ward the close of last year -- I think it was around Christmas time, but it might have been before -- I received a telephone call in the evening from a woman -- I identify her as a woman by her voice -- who identified herself as Jacqueline Zelrick. She told me that she was

calling me relative to an adoption, and I inquired as to what she meant. She told me that she was pregnant; that she wanted to place the child when it was born for adoption.

Q. At this point, if I may interrupt you, Mr. Defendant, can you tell us how she happened to call you, if you happen to know? Of all the lawyers in the District of Columbia, how did she happen to call you, if you can tell us? A. I asked her that question.

Q. All right. A. And her answer, to the best of my recollection, was that a friend of hers had given her my name. I made no further inquiries after that.

Q. All right. Now, tell us, then -- continue on, sir. A. I told her that I could not help her; that I was not permitted by the law to help her. I told her that the best thing that she could do would be to go to -- either directly to Welfare or the Family and Child Services and talk with them and see if she could receive some aid or assistance from them.

91 Q. Now, was this over the telephone or was this face to face, Mr. Defendant? A. This was over the telephone.

Q. All right. And you did not know -- all right -- you did not know the person at that time. A. No; I did not.

Q. All right. Now, was there anything else said at that time? A. Yes.

Q. What else? A. I also informed her that -- I informed her briefly as to what the baby broker law was. I told her that because of that law -- I tried to explain to her in layman's language and not --

Q. Well, tell us how you explained it to her then? A. I told her that the law prohibited any person who was not licensed to place a child or to help to place a child for adoption unless that person was a parent or a very close relative of the baby or a legal guardian of the child. I told her, on the other hand, that if she found herself some people who wanted to adopt that child, that there were certain legal matters to be taken care of, that there might be things that would have to be done which these people might not be able to do for themselves, then in that

case, I would be able to help her to that extent.

92 Q. All right. A. Now, that was the extent of the conversation.

Q. All right. Now, then, later was there another conversation or did she come to your office or did you contact her or vice versa? A. There was another conversation.

Q. Was that over the telephone? A. Over the telephone.

Q. Was it the same party? A. It was the same party. I recognized the voice.

Q. How long after the first conversation did the second one take place? A. This conversation -- second conversation took place, I believe, sometime in March.

Q. All right. What was said? A. And at that time -- this was about ten o'clock in the evening that the call came, and I was in the office that night because I had some work to do that I had to get out before morning. I was almost completed with that work when the call came and she told me that she wanted to see me. Now, from the tone of her voice and from the way -- from what she said, I got a very definite and vivid impression that here was a girl who was very distraught, very upset, that might do something drastic to herself and she -- I can safely use the word -- begged me to stay in my office until she

93 could get there because she wanted to talk to me. And because of her condition, as I understood it to be from the tone of her voice and the conversation, I agreed that I would wait for her until she came. And I continued with my work and since there's always work to do in a law office, I just worked until she came. What time that was exactly, I don't know, except that I do know that the conversation that I had with her and the meeting ended after midnight.

Q. Well -- all right -- well, then, what transpired or what took place during the conversation? A. Now, at that conversation I told her, in effect, what I had told her during the first conversation: That I was not permitted to help her in the way she wanted me to, that is, to find or to produce a couple that would take the baby. At no time did I tell

her that I knew of a couple in New York or anywhere else who would want the baby.

Q. Well, now, Mr. Witness, you heard -- Mr. Defendant, you heard her mention the name of some couple, I think, in New York. Did you suggest the name of any person or persons? A. No; I did not. Not at that time.

Q. Well, did you at a later time? A. I did at a later time.

Q. Well, when was that and how did that come about? A. Sometime after -- (pause) -- may I continue with the conversation --

94 Q. Yes. Yes. Certainly, sir. A. -- that happened at the office?

During that conversation I asked her whether or not she had told anyone else that she wanted to have this baby adopted when it was born and she told me that she had. And I asked her just what she had done. She told me that she had talked to many of her girl friends, people that she knew, telling them that she wanted to have this baby adopted because it was not her husband's and she did not want to keep it and did not feel that she could afford to keep it.

I naturally didn't inquire as to who these people were that she talked to, but I did get a very definite impression that she talked to a number of people and that in effect she was trying to let as many people know as she could that she wanted this baby adopted so that somebody would come forth and make the offer to adopt.

It was some time after this conversation that night that I received a telephone call from a man who identified himself as Mr. Blake, and he told me that he had wanted -- that he had heard of a girl who was pregnant and would I help them get together so that they could discuss the adoption arrangements if such things were possible. I talked with him. I don't remember too much of that conversation. I told him that, before I could do anything along that line, I would have to have a

95 meeting with him first and with his wife. I also asked him to send me a retainer.

Q. Asked him to send you what? A. A retainer.

Q. Oh. How much? A. I believe it was for $250.

Q. All right. Now, continue on, sir. What was the retainer for, sir? A. Well --

Q. For legal services? A. Yes. He asked me to help arrange a meeting. He was going to meet with me in Washington. He and his wife were going to come down to Washington to meet with me. He had called me on the telephone and I felt that, in view of this forthcoming meeting, regardless of anything else that might happen, I was entitled to a fee.

Q. All right. Anything else, sir? A. Not at that time. Not in the telephone conversation.

Q. Now, in what -- A. Except an appointment was made to meet me.

Q. All right. A. And I did tell him that I would contact the young lady in question, that is, Jacqueline Zelrick, and tell her that there
96 were some people interested in meeting her.

Mr. and Mrs. Blake did come to Washington and we spent a couple of hours in a conference. I had, between the time of the conversation by telephone and the time of the conference, contacted Mrs. Zelrick and told her that these people did want to meet her and we would try to meet at some place that was convenient for her to be at.

She suggested Fairfax Village and that we meet in the drugstore there, because it was convenient for her to get to that point from her home.

Q. Well, tell me this, Mr. Witness: Was there any reason why the transaction could not have occurred in your office? A. There was no reason at all.

Q. All right. Now, continue on. A. As a matter of fact, Mr. and Mrs. Blake did come to my office. It was from my office that we went to Fairfax Village to meet Mrs. Zelrick. None of us, that is, neither Mrs. or Mr. Blake or myself, had any dinner. I don't recall whether Mrs. Zelrick had eaten --that is, I don't know what she said, whether she ordered a meal or not -- but we did go to a restaurant; we

sat down, and over the dinner table the matter of the adoption was discussed. And at that meeting Mrs. Zelrick and Mr. and Mrs. Blake arranged between themselves that Mrs. Zelrick would give the child

97 for adoption to Mr. and Mrs. Blake after it was born.

Q. Mr. Defendant, you heard the witness testify that you gave her checks for rent and there were sums of money passed. Did that happen? A. Yes.

Q. Well, how much did you pay her? A. Well, I would object to the use of the word "pay," sir.

Q. Well, all right. I will withdraw that. Were there checks passed? A. I gave, at the request -- at a general request of Mr. and Mrs. Blake -- sufficient funds by check and, I believe, one time in cash to Mrs. Zelrick so that her children would not be in want and so that she would not be in want during the time of her pregnancy and for the period of time following her pregnancy before she could go to work.

Q. Yes. Well, Mr. Defendant, you were not related to her. She was no relation to you. A. No. Not related to her.

Q. Will you tell Her Honor then so that she may know: Why were you particularly solicitous for her welfare, as to whether she would have food to eat and clothes to wear and liquids to drink? Can you tell us that? A. Yes.

98 The reason I was solicitous of her welfare is that I was acting on behalf of my clients, Mr. and Mrs. Blake, who had an active interest in her health because they felt and I -- that if she were not in good health that the baby might not be in good health and, since they were interested in adopting this baby, they wanted a healthy baby and they had asked me to give to Mrs. Zelrick for them whatever was reasonable to keep her housed, clothed, and fed.

Q. Now, Mr. Defendant, at that time, you, being an attorney, were you conversant with the provisions of the baby broker law? A. Yes.

Q. And, in other words, is it your testimony that whatever you did, you did within the limits of that law? A. It most certainly is.

Q. All right. Now, tell me when and where and the circumstances under which you were arrested. First, let me ask you this: You heard the lady testify who was here -- I think the lady from one of the agencies -- she said that you came to Mr. King's office and there was some conversation, I believe, with you, Mr. King, and the lady. How did you happen to come to Mr. King's office on that occasion?
A. Mr. King was good enough to invite me to his office to discuss the matter of the adoption of baby Zelrick, I think was the way his letter
99 was worded.

Q. He dealt with you kindly; did he? A. Not too kindly.

Q. Well, anyway, what did he say? Did he say -- well, what did Mr. King say to you -- no; before you came there, did you know why you were coming? A. Yes. I knew why I was coming.

Q. Well, how did you know? A. I knew why I was coming because of the name and Mr. King's letter or invitation. I had been, as you have heard, to Dr. Price's office. Dr. Price's letter to Mrs. Zelrick, which I saw, had said something to the effect that if the matter which he wished to discuss with her were not cleared up, he would feel impelled to notify the proper authorities.

Q. Who is saying this? A. This is in the letter from Dr. Price to Mrs. Zelrick in which he asked her to come to his office.

Q. Yes. Well, what I want to know is what was it Mr. King said to you when you got -- you say that you knew what was -- what he was going to talk about. Do I understand you didn't know that from Mr. King? When he called you, you just thought it was a social visit; he wanted you to drop in for a chat? A. No. I'm afraid not.

100 Q. All right. Well, what did he say to you over the telephone that -- A. Mr. King did not call me on the telephone. He sent me a letter --

Q. All right. A. In which he invited me to his office, not to just drop in anytime, but at a specific hour on a specific day.

Q. Did he say -- was there anything in the letter -- was it a friendly letter? A. It was -- no; it was not friendly.

Q. Well, all right. A. It was not unfriendly though.

* * * * *

Q. All right. Now, Mr. Witness, in the letter that Mr. King -- and I understand that he does write good letters -- but in the letter that he wrote to you, did he mention anything about the substance of your visit, what it was about? A. Yes; he did. He mentioned the
101 name Zelrick and said that it referred -- it was on the matter referring to the Baby Zelrick adoption -- I think were the words in the letter.

Q. Now, then, what transpired then? Well, put it this way: When the lady was on the stand -- the lady, you know, with the beads on and the blue dress -- did she accurately depict what took place at the meeting in Mr. King's office? A. Yes.

Q. In other words, was -- her story was correct. A. To the-- as I remember her story, I think it was substantially correct.

Q. All right, sir. Now, Mr. Witness, you heard the Doctor when he was on the stand testify that there was a Dr. Michaels, or someone named like that, I believe, that you engaged -- did I understand the witness correctly? Did that happen? A. No; it did not happen. I did not engage Dr. Michaels.

Q. Well, did you know anything about Dr. Michaels' participation in the case? A. Not until I had the pleasure of being in Mr. King's office.

* * * * *

102 Q. Now, tell me this: Do I understand that -- did some witness say something that was untrue? A. Yes.

Q. What was said that was untrue? A. Someone on the witness stand stated that I had said that I represented Mrs. Zelrick. That statement was untrue.

103 Q. All right.

MR. LAUGHLIN: You may examine, Mr. King. I assume you have some cross-examination.

MR. KING: I have some few questions.

CROSS-EXAMINATION

BY MR. KING:

Q. Mr. Dobkin, I believe you said that the reason that you made these payments for this lady's rent and money for food was for this -- because your clients were concerned about this lady's health. A. That is true.

Q. And they wanted to make sure that she stayed in good health. Did that include the flowers? A. (Pause) -- I don't know whether -- I would -- I think the flowers came out of my own pocket.

Q. That was a gratuity of yours. A. That's right.

Q. Your clients didn't pay for that. A. I don't believe so.

Q. How much did your clients give you for that purpose? A. For what purpose?

Q. Of taking care of this lady's health. A. (Pause) -- They gave me a total of $1,250.00.

Q. And that was for her health? A. That was to be used as
104 needed for her.

Q. Expenses? A. For her expenses, whatever she needed.

Q. Did these people ever offer to pay Dr. Price? A. When I discussed, as part of my duty to my clients, the matter of payment to Dr. Price, Mrs. Zelrick told me that the -- all or part of the hospital or medical bills were covered by Blue Cross or some -- might not have been Blue Cross -- but by medical insurance.

Q. You also knew that your clients were concerned about getting a baby that was a healthy baby. A. That is true.

Q. Because they wanted her health to be good, which they felt was necessary for that purpose; is that right? A. That is correct.

Q. You know Dr. Paul; don't you? A. I know Dr. Paul.

Q. You've known him long before this occurrence here. A. Yes.

THE COURT: Dr. who?

MR. KING: Paul.

THE COURT: Oh.

BY MR. KING:

Q. Out in Prince Georges County -- A. Yes.

105 Q. -- isn't that right, sir? A. Yes.

Q. But yet your clients' doctor happened to be the very man who contacted Dr. Paul and not you. A. Would you repeat that question again. That was more in the form of a statement and not a question and I didn't get it.

Q. I understood you to tell us that your clients' doctor was the person who contacted Dr. Paul, but you admit now that Dr. Paul is well known to you and you've known him over quite some time. A. Sure. I admit that I know Dr. Paul.

Q. And you know him in what connection? He's not your patient -- you're not a patient of his; are you? A. No, because Dr. Paul is a pediatrician.

Q. And have you had children delivered by Dr. Paul? A. I have no children.

Q. I didn't think you did. Then what would be your connection with Dr. Paul? A. He's a friend of mine.

Q. Just as a friend? A. Yes.

Q. And how did you happen to meet Dr. Paul? A. I don't recall the circumstances under which I met Dr. Paul.

106 Q. You don't recall where you met him or when you met him? A. No; I don't. I believe that I met him at someone's home, but I'm not sure.

Q. You're not sure of that. A. No. I've known Dr. Paul a long time.

Q. Do you know how much Dr. Paul got paid for his services? A. Do I know how much Dr. Paul got paid for his services?

Q. Yes, sir. A. In what connection?

Q. In this case. A. (Pause) -- I don't think -- so far as I know, Dr. Paul didn't get paid.

Q. He didn't get paid. A. No.

Q. But you paid Dr. Michaels. A. If I paid Dr. Michaels -- and I don't recall whether I did or not --

Q. Well, didn't you tell me that, sir? A. I don't know.

Q. That you paid Dr. Michaels $25.00. Don't doctors normally make examinations at hospitals for $25.00? A. I don't know what the normal fee of a doctor is.

107 Q. Did you not tell me that you paid him $25? A. I might have. I don't recall whether I told you that. I don't recall whether I paid him. I could have though.

Q. But you could have. Do you recall what you paid for Mrs. Zelrick? A. In what connection?

Q. In this connection. You didn't know her in any other connection; did you? A. You said what -- what I paid for Mrs. Zelrick?

Q. Yes. You just said let it not be said that you paid her; so, I'll say what you have paid for her then. A. You mean how much money did I give her --

Q. Yes. A. -- in the form of cash or checks?

Q. Well, did you give it to her in cash also? A. I think I gave her some money in cash.

Q. How do you keep your records in that respect? A. (Pause) -- What do you mean how do I keep my records?

Q. Well, I mean, whether you paid her in cash or whether you paid her by check. How do you keep your records? A. What records? By writing down numbers.

Q. Oh, you (laughing) -- you sound like -- A. I don't mean I'm a numbers writer.

108 Q. Well, don't you have any records of how much you paid Mrs. Zelrick -- or, paid for Mrs. Zelrick? A. I have an idea of how much money she received from Mr. and Mrs. Blake.

Q. And notwithstanding the pendency of this case and so forth, you made no effort to find out just exactly how much you paid and what -- A. Because it doesn't make any difference so far as I know.

Q. It makes no difference to you? A. It doesn't make any difference to me.

Q. Although you're claiming that some people by the name of what -- what's that name? A. What people are you referring to?

Q. Your clients. A. My clients' name is Blake.

Q. What is his first name? A. His first name is Morris.

Q. Morris? A. Yes.

Q. And is he -- do they call him anything but Morris? A. Yes. They don't call him Morris.

Q. What do they call him? A. They call him Buddy.

Q. And that's how you introduced him to Mrs. Zelrick? A. That's right.

109 Q. You referred to them as Buddy and Louise. A. That is correct.

Q. And yet they are supposed to be people known to her, that she herself is the person who knows about them or knew about them. A. She talked with them and agreed with them. They asked me --

Q. Through whom? A. They talked directly across the dinner table.

Q. How did that come about? A. That came about at the request of my clients.

Q. Through whose arrangement? A. I arranged for my clients to meet with Mrs. Zelrick.

Q. And you don't feel like that that is aiding or assisting in the placing of a child? A. Absolutely not.

Q. You can make all the arrangements but you're not aiding. A. If -- if -- if I can make all the arrangements at the request of my clients -- if my clients ask me to do something, I feel I have a right to do it as an attorney. And even you could do it, too, if your clients were to ask you.

Q. You believe that. A. Yes, sir.

110 Q. Notwithstanding the Court's statements in the Anderson case that you may also remember. Did you read that case? A. I am very familiar with the Anderson case.

Q. All he did was arrange; wasn't it? A. The Anderson case --

Q. Did he do anything other than arrange, sir? A. The Anderson case does not state whether or not the clients or the adoptive parents were directly or indirectly -- whether they asked for or did not ask for the meeting with the mother of the baby.

Q. Well, as you understand -- A. The situation as far as the Anderson case --

Q. Excuse me. A. -- goes and as far as the Court of Appeals decision goes does not state what the facts were prior to the actual twenty-four hours during which the delivery of the child by the natural mother to the adopting parents was made.

Q. Well, as I understand your testimony, you originally were contacted by Mrs. Zelrick with regards to her child, that she wanted to put out for adoption. Is there any argument about that? A. No argument about that, Mr. King.

111 Q. And as I understand you -- adoption is not part of your general practice? Or is it? A. Well, I don't know what you mean by "adoption."

Q. Well, is that not your principal practice? A. That is not my principal practice.

Q. Not your principal practice. A. I'm glad you know about my practice, Mr. King.

Q. Well, don't you think I should? A. I think you think you know more than you do know.

Q. With respect to this particular case, sir, and not having reference to any other cases — A. That's better.

Q. -- you had been contacted by Mrs. Zelrick who had informed you that she wished to place her child out for adoption that was not yet born. A. No argument. That is correct.

Q. No argument about that. A. No.

Q. Did you not tell her that if you happened to run across someone who wanted to adopt a child that you would so inform her? A. I did not.

Q. You did not tell her that. A. I did not.

Q. And she contacted you on three different occasions; is that right, sir? A. I think it was two.

112 Q. Well, she telephoned you twice, I understood you to say, and then she came to your office the third time. A. Yes. But the time she came to my office was several hours following the second telephone call.

Q. Oh, I see. So, you consider that one contact. A. Well, you can consider it as you want.

Q. Well, I'm not going to make a point of it, please. I just want to see what you consider it so that I know what we are talking about. And at that time Mrs. Zelrick came around and she spent some hour and a half at your office; didn't she? A. I believe she did.

Q. And that hour and a half was spent in discussing how these things could be done; wasn't it? A. That -- most of that hour and a half was spent in my talking with Mrs. Zelrick and trying to get her out of the suicidal mood which she was in.

Q. Oh. You were then acting in the capacity of a psychiatrist? A. Now, you're going to have me arrested for practicing psychiatry without a license.

[Laughter]

Q. At any rate, she departed and you had her telephone number. A. Yes.

113 Q. For what purpose? A. Because she asked me to take it.

Q. Asked you to take it? A. Yes.

Q. For what purpose? A. She said just in case you hear something or you do something for me.

Q. And you did call her; didn't you? A. I did call her after the Blakes asked me to call her.

Q. After you had contacted the Blakes; isn't that right? A. That's your interpretation. I would like to answer --

Q. It's just on which end of the line you happen to be; isn't it? A. I don't know how you want to interpret it. I know what happened and I already testified as to what happened.

Q. But a family in the great state of New York contacts you and tells you of a certain person who has just recently been to your office that had a baby out for adoption; is that your testimony? A. My testimony, I will repeat again so that the record is clear, is that Mr. Blake
114 telephoned me, told me that he had heard of a girl whose name was Jacqueline Zelrick -- I want to correct that -- gave me her name as Jackie.

Q. Incidentally, had Mr. Blake ever contacted you before in his lifetime? A. No.

Q. Had not. A. No; had not.

Q. So, the first time that you knew of Mr. Blake was when Mr. Blake happened to pick you, an attorney in the whole city of Washington, to call -- at what time, sir? A. What time he called me?

Q. Yes. A. I don't remember. It was during the day, during office hours.

Q. But do you remember when he called, what day he called you, what time of the year, what month he called you? A. It was in the spring.

Q. What month? A. It was sometime in March.

Q. And how soon after Mrs. Zelrick had been at your office in March? A. It was several weeks.

Q. Several weeks thereafter? A. It might have been early
115 April. I think it was in March.

Q. And what was the agreed fee at that time for your service or did he just say, 'It doesn't make any difference; whatever it costs, I'll pay?" A. We did not discuss fees.

Q. That was not discussed at all? A. I only asked -- I did ask him for a retainer.

Q. How much retainer? A. Two hundred fifty dollars. I've already testified to that.

Q. How did the $1,250 get into the picture? A. At a later time he gave me a check for a thousand dollars and told me that it was to be used for what I thought was reasonable for Mrs. Zelrick's expenses --

Q. Now, you used what? A. -- and necessities.

Q. You used about $600; is that right, sir? A. I used closer to $700.00.

Q. Well, did you refund the additional $300 to him? A. I have not yet refunded the additional $300.00.

Q. You have not yet refunded it. A. No; I have not.

Q. Do you intend to refund it, sir? A. That will depend on further conversation that I have with Mr. Blake.

116 Q. Further conversation? A. Yes. He has not asked me for the money. He knows how much money --

Q. You, as an attorney, having taken a thousand dollars of his money for a specific purpose, would you not advise him, that, 'I have $300 left over?" A. He has been so advised.

Q. But you did not return it to him. A. He did not ask me for it. He did not suggest that I return it at that time and I asked him what to do with it. He said, "Hold on to it."

Q. Now, then, when you went out to -- oh, let's put it this way: Did you ask Mrs. Zelrick to advise you if any question came up about this baby? A. Yes.

Q. And when she told you about Dr. Price contacting her, what was the purpose of your going with her? A. Mrs. Zelrick, as I

believe you know as well as anyone in this courtroom --

Q. You weren't representing her; were you? A. No; I was not representing her.

Q. You went out there representing who then? A. I went out there at that time in -- (pause) -- a capacity that might be called dual.

117 Q. Huh? Called what? You relate to us what you -- who you were representing when you went there. I assume you went there as an attorney representing somebody. A. I was representing Mr. and Mrs. Blake.

Q. How could Mr. and Mrs. Blake be involved in any matter before Dr. Price? A. Because Mr. and Mrs. Blake had had the baby that they were to adopt delivered by Dr. Price.

Q. They had him deliver it? A. That baby that --

Q. Wait a minute. A. If you're asking a question, I want to clear it up so that the record --

Q. You say that they had him deliver it. I want to know what you mean by that. A. I didn't say that. I said that they had had a baby which they took for adoption delivered by Dr. Price. If my English is not clear, I will explain further: that the baby that they took for adoption was delivered by Dr. Price, not at their behest but at the specific request of the mother of the baby, Mrs. Jacqueline Zelrick.

Q. You knew that to be a fact? A. (Pause)

Q. Is that right? A. That the baby --

118 Q. You knew that to be a fact, that it was at the specific request of Mrs. Zelrick to Dr. Price? Is that right? A. Not of my own knowledge.

Q. Well, you learned it from whom? A. I learned it from Mrs. Zelrick.

Q. And at that time she was in your office? A. No. No. No. No.

Q. Well, where was she at that time when you learned that? A. The time that I first heard Dr. Price's name was at Rector's Restaurant in Marlow Heights.

Q. And that meeting there was arranged for the placement of

the child; was it not? A. That meeting was for the purpose of Mr. and Mrs. Blake talking with Mrs. Zelrick to see whether or not the two parties could agree on an adoption of the particular child.

Q. Having been brought together by you. A. Having been brought together --

Q. Right, sir? A. -- at the specific request and instructions of my clients.

Q. But by you. A. By me, of course, as the attorney for my clients. Who would do it if not their attorney?

119 Q. So, you take the position then, if I understand you, that it depends on which party you're representing as to whether you can aid and assist in the placement; is that it? A. That would call for a conclusion from the witness, your Honor.

Q. Well, you have already testified, sir, with respect to some law on direct testimony, as to what you interpret the law to be, and I'm asking you now, sir: Did you interpret the law to be that it depends on who you are representing when you are aiding and assisting in the placing of a child? A. No.

MR. KING: I have no further questions.

REDIRECT EXAMINATION

BY MR. LAUGHLIN:

Q. Mr. Dobkin, you like babies -- I mean, little ones; don't you? A. Yes.

Q. All right. Now, Mr. Dobkin, about your interpretation of the law -- Mr. King asked you -- even after his cross-examination, is it still your contention that you were within the limits of the law? A. Yes.

Q. And you say you're conversant with the case that he cited.

120 A. Yes.

Q. What did that case stand for? A. That case said that the law prohibited the arrangement or assisting in arrangement of placing a child under the age of sixteen in a home -- in a family home or for adoption. This was the general tenor of the decision and, to the best of my recollection, it also stated that it did not matter whether a fee

was paid for this or not. The Court went further and said that if -- no matter how a man felt about it, whether he was doing it out of the kindness of his heart, whether he was taking a baby -- I don't know whether they went this far -- but they indicated that if he was rescuing a child from very bad and poor circumstances, it was still against the law. But that case does not say whether the original contract was made by Judge Anderson with the clients -- his clients, that is, the adoptive parents or whether the adoptive parents had come to him and asked him to do certain things, that is, whether he had volunteered to them to do things or whether he had been instructed and asked to do things. If I'm wrong about that, Mr. King will be happy to correct me.

Q. Well, now -- all right -- now, Mr. Defendant, is there -- oh, there was one question -- Mr. King asked you about this money -- how did the figure $1,250 -- that particular amount, $1,250 -- get into the picture? A. I originally asked Mr. Blake to send me a retainer after
121 he called me and said he wanted this meeting with Mrs. Zelrick. I wanted that as a fee. At a later date -- and I don't know exactly when it was -- but I believe it was after -- when I was taking Mr. and Mrs. Blake to their hotel, where they were spending the night, that we agreed that he would give me a thousand dollars to be put in escrow as a -- (pause) -- as expense money for Mrs. Zelrick if she should need it.

Q. And you did put that in a special fund. A. I did not put it in a special fund.

Q. Oh, you put it in escrow? A. I kept it in my own account, but I kept it there.

Q. And there is some record -- A. I didn't steal it.

Q. Oh, no. No. I don't think Mr. King is accusing you even of that. But I think -- what I want to know: Is there someting in your office that pinpoints this particular sum of money in your account? A. Oh, may I correct myself? I did put it in an escrow account.

Q. You did. A. I did put it in an escrow account. I did put that money in an escrow account.

Q. And it still is? A. I did.

122 Q. And still is? A. And it is there.

MR. LAUGHLIN: I believe that's all.

MR. KING: I have no further questions.

* * * * *

128 RULING OF THE COURT

THE COURT: It seems to the Court that, no matter what the motives that guide an attorney in an activity of this kind, the law is pretty specific and the Court, as late as 1959, said it very carefully in the language that you just read, Mr. Laughlin, and it prevents any attorney from serving as an intermediary or a go-between. It seems to this Court -- and the Court so holds -- that it requires that, if he's going to advise these people, that he make an arrangement that they get in touch with the proper adoption authorities; that that is a requirement. If he wants to advise his clients of that sort of thing, that is his duty. But he may not himself act as an intermediary.

I'm afriad that this attorney has gone beyond the scope of the law, and the Court will have to find him guilty in this case.

The case is closed.

* * * * *

130 Washington, D. C.
Thursday, December 20, 1962.

The above-entitled matter came on for sentencing before JUDGE MILDRED E. REEVES in Courtroom No. 18, Criminal Division Building, at 1:30 o'clock p.m.

* * * * *

135 THE COURT: Well, you take it up with the Court of Appeals if you want to, but I think that the Court -- this Court is satisfied that there was a proper proceeding and that you were given every opportunity.

This Court, at the time of the trial, was inclined to be somewhat sympathetic in this case. I did not know of any prior record until after the case was over. I have since learned that about a year before Mr.

Dobkin was involved in the same kind of a charge and was sentenced on the same kind of a charge. At that time he received a sentence of ninety days or $300.00. The ninety days was suspended. Now, a year later, he is involved in the same thing -- just a year later. So, he has
136 no place to plead ignorance, misunderstanding, or anything else. There is nothing that I can find in this case that can be considered in mitigation. It's regrettable. It is never pleasant to sentence anybody and, certainly, not a member of the bar. The standards are high and they have to be maintained. And Mr. Dobkin is in no position, on his record, to claim ignorance.

The maximum in this case -- the maximum under the law is ninety days or $300 -- ninety days and $300 or thirty days. And that is the sentence the Court is going to impose.

* * * * *

(R. 149)

[Filed December 20, 1962]

[Caption omitted]

MOTION FOR NEW TRIAL

Now comes the defendant and moves the Court for a new trial on the following grounds:

1. The verdict was contrary to the evidence.
2. The Court was in error in refusing to quash the warrant.
3. The Court was in error in requiring the defendant to take an oath and go to trial on the Sabbath.

[Signature line and Certificate of Service omitted]

(R. 150)

JUDGMENT

Judge Reeves

Defendant's motion for a continuance denied.

Defendant's motion for a new trial denied.

Judgment guilty.

Ninety days and $300.00 or thirty days additional.

Appeal noted.

Appeal Bond $700.00.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 3248

* * * * *

Before Hood, Chief Judge, Myers, Associate Judge, and Cayton (Chief Judge, Retired).

CAYTON, J.: Appellant, a practicing lawyer, was convicted of violating the so-called Baby Broker Act. Code 1961, §§32-781 to 32-789. He contends (1) that the statute is unconstitutional and that the evidence did not support a conviction; (2) that the arrest warrant was invalid because based on hearsay evidence; (3) that he was illegally arrested at 12:30 a.m.; (4) that he was entitled to a continuance because the trial was extending into his Sabbath; and (5) that he was entitled to a jury trial.

We will consider together the claims of unconstitutionality and insufficiency of the evidence. The governing language of the statute, Code 1961, §32-785 provides:

> 'No person other than the parent, guardian, or relative within the third degree, and no firm, corporation, association, or agency, other than a licensed child-placing agency, may

place or arrange or assist in placing or arranging for the placement of a child under sixteen years of age in a family home or for adoption.***"

Appellant says the Act is vague and indefinite, and therefore unconstitutional. In two earlier cases, also involving lawyer defendants, we held that the standards prescribed in the Act were reasonable and clear, and conveyed a sufficiently definite warning as to conduct that will amount to a violation. We said:

"We think it plain that so long as the lawyer gives only legal advice; so long as he appears in court in adoption proceedings, representing either relinguishing or adopting parents; so long as he refrains from serving as intermediary, go-between, or placing agent; so long as he leaves or refers the placement of children and the arrangements for their placement to agencies duly licensed, he is within his rights under the statute.***" Goodman v. District of Columbia, D.C.Mun.App., 50 A.2d 812, 815; Anderson v. District of Columbia, D.C.Mun.App., 154 A.2d 717, 719.

The evidence against appellant was that a woman expecting a child contacted him and asked for help in placing the child for adoption; that appellant later called the expectant mother informing her that a couple from New York, who were interested in adopting her baby, would be in town and he arranged a meeting between them; that the New York couple gave him money to be used in supporting the expectant mother; that when the baby was born the mother contacted appellant who went to the hospital and had her sign adoption papers he had prepared; that appellant and the couple escorted the mother and the baby from the hospital, and the couple then took the child with them and the mother went home.

Appellant's testimony did not vary substantially from the above except that he stated after his meeting with the mother, he was contacted by the New York couple who said they knew of a woman in Washington who wanted to place her expected child for adoption. He said they gave him the name of the woman with whom he had already conferred. It

is apparent that appellant's course of dealing showed him to be in violation of the statute and justified a conviction.

We find no validity in appeallant's contention that the arrest warrant, because based on hearsay evidence, violated the Fourth Amendment and the Federal Rules of Criminal Procedure. It is settled that an arrest can be made on the basis of hearsay evidence even if the arresting officer does not have a warrant, so long as probable cause exists. Draper v. United States, 358 U.S. 307.[1] Nor is there any basis for holding, as appellant would have us do, that the warrant of arrest should have been quashed because it was served upon him at 12:30 a.m. The circumstances of his arrest did not impair the jurisdiction of the court to try him. United States v. McNeil, D.C.Mun.App., 91 A.2d 849, citing Frisbie v. Collins, 342 U.S. 519.

We next consider appellant's contention that his "right to religious freedom" was violated because he, a member of the (Reform or "liberal") Jewish faith, was forced to proceed with his trial after sundown on a Friday--the advent of the Jewish Sabbath. We would agree at once that no man ought to be required to violate his conscientious religious scruples by submitting to trial on a day he actually observes as one of worship. But here, inquiring into the situation, the trial court learned from appellant that he actually went to his office and worked on Saturdays, and was justified in concluding that there was no valid religious basis for putting the trial over to another day. Other circumstances, including the fact that the trial had been, without objection, reset for that day and hour, indicate that there was no prejudice in this situation.

We now turn to appellant's claim that he was entitled to a jury

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[1] See also Jones v. United States, 362 U.S. 257, where hearsay evidence was upheld as properly supporting the issuance of a search warrant.

trial. First, he relies on Code 1961, §11-71 5a,[2] which provides that a defendant is entitled to a jury trial if the fine or penalty may be more than $300, or imprisonment may be more than ninety days. The maximum penalty for violating the Act is a fine of up to $300 or imprisonment up to ninety days, or both.[3] Appellant argues that in applying §11-71 5a, we may add days to dollars and vice versa in determining whether the "more than" requirement of the statute has been met so as to entitle him to a jury trial. But we think it clear that when §11-71 5a states that "the fine or penalty may be more than $300," the words "fine or penalty" refer only to money, and that similarly "imprisonment" in the following phrase refers only to time and not dollars. We adhere to the ruling made in Rogers v. District of Columbia, D.C.Mun.App., 31 A.2d 649, and hold that under the statute appellant was not entitled to a jury trial.

Appellant also argues that he is entitled to a jury trial because this was his second conviction under the same statute and hence he was liable to be subjected to a fine or imprisonment (or both) fifty percent greater than the maximum fine and imprisonment allowable for the first offense. He cites Code 1961, §22-104, which states:

> "Every person upon his second conviction of any criminal offense punishable by fine or imprisonment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one half longer than the maximum fine and imprisonment for the first offense."

The real question is whether a defendant is subject to the fifty percent greater penalties just stated if he has not been given notice prior to

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[2] Code 1961, §11-71 5a provides: "*** In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury. ***"

[3] Code 1961, §32-788.

trial that the prosecution will ask for the added penalties. Obviously it is imperative that a defendant have knowledge of the penalty he may receive, because his right to a jury trial depends on the severity of the punishment. In second offender cases, knowledge of what penalty will be demanded rests solely with the government, and this places a duty on the government to impart such knowledge to the defendant in time for him to demand a jury trial. The importance of this is revealed in the instant case where liability to the fifty percent greater penalty would have enabled appellant to fall within §11-715a. Since no notice was given to appellant that the government intended asking for the greater penalties, he was only subject to the penalty that could be imposed on a first offender.

This case is similar to Jacobs v. United States, 58 App.D.C. 62, 24 F.2d, 890, decided in 1928, where the defendant had been tried for a second offense against the National Prohibition Act. The court said:

> 'In a case where a party is proceeded against for a second or third offense under the statute, and the sentence prescribed is different from the first by reason of its being a second or third offense, the fact thus relied on must be averred in the indictment. ***" Id., 58 App.D.C. at 63, 24 F.2d at 891.

In essence the decision required that a defendant receive advance notice if the prosecution intended to ask that he receive a greater punishment because of his prior offense(s). That reasoning applies here.[4] If a defendant is to be subjected to the fifty percent greater penalty under §22-104, he is entitled to notice of this prior to trial. Any other ruling in a case like that presently before us would enable the government to deprive a defendant of the right to a jury trial by not requesting the added penalties until time of sentencing. In this case the government gave no notice to appellant prior to trial that he might be

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[4]This reasoning is not affected by what was said in Jordan v. United States District Court for Dist. of Col., 98 U.S.App.D.C. 160, 233 F.2d 362, and Jackson v. United States, 95 U.S.App.D.C. 328, 221 F.2d 883.

subjected to the added penalties of §22-104; consequently he could not have been subjected to them. Therefore, the penalties appellant could have received were not sufficient to entitle him to a jury trial.

Affirmed.

(R. 177)

The Court met pursuant to adjournment. Present: The Honorable Andrew M. Hood, Chief Judge, Thomas D. Quinn and Frank H. Meyers, Associate Judge.

Proclamation being made, the Court is opened.

* * * * * * *

Before Hood, Chief Judge, Meyers, Associate Judge and Cayton (Chief Judge, ret.).

[Caption omitted]

Appeal from the District of Columbia Court of General Sessions. This cause came on to be heard on the transcript of the record from the District of Columbia Court of General Sessions and was argued by counsel. On consideration, whereof, it is now ordered and adjudged by this Court that the judgment of said Court, in the cause, be and the same is hereby affirmed.

November 4, 1963

Nathan Cayton
Judge

(R. 190)

[Preliminaries and caption omitted]

On consideration of the motion for rehearing filed by the appellant in the above-entitled cause, and the opposition thereto filed by the appellee, it is ordered by the Court that the motion be and it is hereby denied.

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 18,266

ABRAHAM DOBKIN,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The District Of Columbia
Court Of Appeals

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STATEMENT OF QUESTIONS PRESENTED

1

Since the maximum sentence for violation of the "Baby Broker's Act" is a fine of not more than $300 or imprisonment of not more than ninety days, or both, did not the court below properly hold that the appellant was not, under Section 11-715a, D. C. Code, 1961, entitled to a jury trial?

2

Does Section 22-104, D. C. Code, 1961, which provides upon conviction of a second offense "* * * a fine not exceeding fifty per centum greater, and * * * imprisonment for a period not more than one half longer than the maximum fine and imprisonment for the first offense", confer upon appellant any greater right to a jury trial where he was not charged as a second offender and the trial court was not informed, until after its finding of guilty, that appellant had been convicted of a prior offense?

3

Did not the trial court, in denying appellant's motion for a continuance, properly conclude, from appellant's own testimony and actions as well as from other facts and circumstances, that there existed no valid basis for such continuance?

Was not evidence of substantial participation by appellant in the placement of a child under the age of sixteen in a home for adoption sufficient to support the judgment of conviction for violation of the "Baby Broker's Act" ?

I N D E X

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SUBJECT INDEX

CASES CITED

DISTRICT OF COLUMBIA CODE, 1961, CITED

ACTS OF CONGRESS CITED

OTHER AUTHORITIES CITED

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* Cases and authority relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 18,266

ABRAHAM DOBKIN,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The District Of Columbia
Court Of Appeals

BRIEF FOR APPELLEE

SUMMARY OF THE ARGUMENT

Because the maximum penalty for violation of the so-called "Baby Broker's Act," § 32-788, D. C. Code, 1961, is a fine of not more than $300 or imprisonment for not more than 90 days, or both, appellant was not entitled to a jury trial under § 11-715a, D. C. Code, 1961. And, since appellant was not charged as a second offender and the trial judge was not informed of the fact that he had been previously convicted of the same offense, he was

not entitled to a jury trial under the provisions of § 22-104, D. C. Code, 1961, which provides for a 50 per cent greater penalty upon conviction of a second offense.

The finding of the trial court that appellant's request for a continuance was not based upon religious convictions, but was made to delay the proceedings, has adequate support in the record. On the whole record, there is substantial evidence to support the judgment of conviction, and the fact that appellant is a lawyer does not place his activities beyond the scope of the plain provisions of the "Baby Broker's Act."

ARGUMENT

I

Appellant was not entitled to a jury trial.

Appellant's contention that, by virtue of Section 11-715a, D. C. Code, 1961, he was entitled to a jury trial is clearly without substance. The maximum penalty for violation of the "Baby Broker's Act," of which appellant was convicted, is a fine of not more than $300 or imprisonment for not more than ninety days, or both (Section 32-788, D. C. Code, 1961). Under Section 11-715a, D. C. Code, 1961, an accused is entitled to a jury trial if "* * * the fine or penalty may be more than $300, or imprisonment

as punishment for the offense may be more than ninety days * * *."
Appellant contends that under this statutory provision he was entitled to a trial by jury. The District of Columbia Court of Appeals disposed of this contention as follows:

> "* * * Appellant argues that in applying § 11-715a, we may add days to dollars and vice versa in determining whether the 'more than' requirement of the statute has been met so as to entitle him to a jury trial. But we think it clear that when § 11-715a states that 'the fine or penalty may be more than $300,' the words 'fine or penalty' refer only to money, and that similarly 'imprisonment' in the following phrase refers only to time and not dollars. We adhere to the ruling made in Rogers v. District of Columbia, D. C. Mun. App., 31 A. 2d 649, and hold that under the statute appellant was not entitled to a jury trial."

Appellant argues with great force the difference in the meaning of the words "penalty" and "fine." Regardless, however, of what meaning may be attached to the two words in the abstract, a reading of Section 11-715a, supra, shows that, as contained therein, the words "fine" and "penalty" were intended to be used interchangeably. Also, as the Court stated in Anderson & Kerr Drilling Co. et al. v. Bruhlmeyer et al., ___ Tex. ___, 115 S. W. 2d 1212, 1215,

> "* * * 'The rule of construction, "ejusdem generis," is thus stated: "General words following particular words will not include things of a superior class." There is this further restriction of general words following particular words, that the general words will not include any of a class superior to that to which the particular words belong.' * * * "

Section 11-715a, supra, was originally enacted on March 3, 1891.[1] As originally enacted it provided, in pertinent part, as follows:

> "* * * And also in all prosecutions in which such persons would not be by force of the Constitution of the United States entitled to a trial by jury, but in which the fine or penalty may be fifty dollars or more or imprisonment for thirty days or more, the trial shall be by jury * * *."

The wording of the statute was changed slightly on March 3, 1901,[2] and has, except for the amount of the fine and length of imprisonment, remained unchanged since that time.

Although appellant contends that the words "fine" and "penalty" in the above Acts were not intended to be used

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[1] An act to define the jurisdiction of the police court of the District of Columbia, c. 536, 26 Stat. 848.

[2] An Act To establish a code of law for the District of Columbia, c. 854, 31 Stat. 1189, 1196.

interchangeably, he has referred to nothing in their seventy-three year history which supports him. On the contrary, the Congress has consistently provided punishment for minor offenses which would, under appellant's construction of Section 11-715a, supra, require a trial by jury. For example, a violation of most minor traffic regulations, such as overtime parking, can result in " * * * a fine or not more than $300 or imprisonment of not more than 10 days, or both";[3] a violation of the building regulations can result in a " * * * fine not to exceed $300 or imprisonments not to exceed ten days, in lieu of or in addition to any fine * * *";[4] and a violation of the vagrancy statute can result in " * * * a fine or not more than $300 or imprisonment for not more than ninety days, or by both such fine and imprisonment * * *."[5]

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[3] Section 40-603, D. C. Code, 1961; Section 158 of Traffic and Motor Vehicle Regulations for the District of Columbia.

[4] Section 1-224a, D. C. Code, 1961; Section 3-173 (a) of The Building Code of the District of Columbia, 1961.

[5] Section 22-3304, D. C. Code, 1961.

Many other minor offenses could be listed in which a jury trial would, under appellant's interpretation of the statute, be required. In fact, if appellant's interpretation is correct, very few non-jury cases would be tried in the District of Columbia Court of General Sessions. Surely such a result was never intended by the Congress. By repeatedly providing, for minor offenses, a fine of $300 and a jail term, or a jail term of 90 days and a fine, the Congress apparently was of the view that the Court's long standing construction of Section 11-715a, supra, is in accordance with the congressional intent.

Furthermore, acceptance of appellant's interpretation of the statute would, in many cases, render its application impossible. For example, it is provided that one convicted of unlawful assembly in front of an embassy "* * * shall be punished by a fine not exceeding $100 or by imprisonment not exceeding sixty days, or both."[6] Under appellant's interpretation of Section 11-715a, it is certainly not clear whether in such a case the "penalty" is such as to entitle one to a jury trial. Moreover, other than to free the appellant, no purpose would be served by disturbing the consistent

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[6] Section 22-1116, D. C. Code, 1961.

interpretation which has been placed on the statute by the District of Columbia Court of General Sessions and the District of Columbia Court of Appeals.

Also without substance is appellant's contention that he is entitled to a jury trial by virtue of Section 22-104, D. C. Code, 1961.

Section 22-104, D. C. Code, 1961, provides that

> "Every person upon his second conviction of any criminal offense punishable by fine or imprisonment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one half longer than the maximum fine and imprisonment for the first offense."

Although appellant was neither charged nor sentenced as a second offender, he takes the position that he nevertheless could have been sentenced as such. From this premise he argues that, upon his second conviction for violation of the "Baby Broker's Act," the possible "fine or penalty" was $450 instead of $300, and the possible "imprisonment as punishment for the offense" was 135 days instead of 90 days, thereby bringing his case within the ambit of the jury trial provisions set forth in Section 11-715a, supra.

It is, however, undisputed that the trial judge was not, prior to appellant's conviction, informed that he had previously been convicted of the same offense (J. A. 53-54). Therefore, in passing upon appellant's request for a jury trial, " * * * pursuant to Title 11, § 616 of the D. C. Code, 1951 Edition" (same as Section 11-715a of 1961 Edition) (J. A. 3), the trial judge was not called upon to even consider the applicability of Section 22-104, supra. Under the circumstances, it can hardly be seriously contended that the trial judge, in denying appellant a jury trial, erred in failing to give due consideration to facts which were not called to his attention.

Appellant attempts to overcome the inherent weakness of his case by reference to pages 11 and 12 of the transcript of the proceedings before the motions judge (J. A. 5) where, at the hearing on his motion to quash the arrest warrant, he was asked, on cross examination, but did not answer, whether he had been previously convicted of the same offense. On page 14 of the same transcript (J. A. 5-6), however, in connection with a hearing on appellant's motion for a jury trial, there is no mention of the fact that he had previously been convicted of the same offense, nor is there any reference to the provisions of Section 22-104, supra. What appears

from the record is that reference to Section 22-104, supra, was made for the first time in appellant's brief filed in the District of Columbia Court of Appeals.

Furthermore, as the court below so clearly pointed out in its well-reasoned opinion, "* * * [i]f a defendant is to be subjected to the fifty per cent greater penalty under § 22-104, he is entitled to notice of this prior to trial. Any other ruling in a case like that presently before us would enable the government to deprive a defendant of the right to a jury trial by not requesting the added penalties until time of sentencing. * * *" The decisions of this Court in Jordan v. United States District Court for the District of Columbia, 98 U. S. App. D. C. 160, 233 F. 2d 362, and Jackson v. United States, 95 U. S. App. D. C. 328, 221 F. 2d 883, cited by petitioner, are not to the contrary. In both those cases the appellants were charged with felonies and were entitled to jury trials irrespective of whether they received advance notice that an additional penalty might be imposed by virtue of the fact that they were second offenders.

II

The trial court did not err in denying appellant's motion for a continuance.

On page 3 of his brief filed in the court below, appellant stated that, because his attorney was engaged in another case on December 13, the date scheduled for appellant's trial, " * * * it was agreed that the trial would be held beginning at 5:00 P.M. on Friday, December 14." On page 14 of his brief filed in this Court, appellant states that his Sabbath began at 4:47 p.m. Friday, December 14, 1962. In view of appellant's agreement to commence the trial after sundown, coupled with the fact that his motion for a continuance was the last of a series of motions made immediately prior to the taking of testimony (J. A. 9), that appellant did not object to being sworn as a witness (J. A. 9), that he had no religious scruples against working in his office on Saturdays (J. A. 14-15), and that the government's necessary witness would be returning to her home in North Carolina beyond the jurisdiction of the Court (J. A. 25), the trial court was certainly justified in concluding that appellant's last-minute motion for a continuance was not based upon any religious convictions, but was made solely for purposes of delay (J. A. 16).

Clearly this appeal involves no due process or first amendment question--it involves merely the question whether the trial court abused its discretion in denying appellant a continuance. For the reasons previously stated, it is apparent that the court did not abuse its discretion.

In any event, appellant has made no allegation or showing of prejudice. And the judgment, which was entered on Thursday, December 20, 1962, is not void as he suggests. In Stone v. United States, 167 U. S. 178, the United States Supreme Court held that, in the absence of a statute making Sunday dies non juridicus, the general verdict was not a nullity by reason of its being received or recorded on Sunday. Significantly enough appellant has referred the Court to no statute in the District of Columbia which makes either Sunday or Friday evening dies non juridicus.

Nor has appellant cited authority for the proposition that a guilty finding against a person of Jewish faith made on a Friday evening is, for that reason, void, and the appellee has found no such authority. Contrary authority, however, appears in the case of Stansbury v. Marks, 2 U. S. 211, 2 Dall. 211 (1793). As apparently was the custom at the time Stansbury was decided, the opinion of the Court, if any, was not reported--only a brief statement of what transpired is recorded, and that is as follows:

> "In this cause (which was tried on Saturday, the 5th day of April) the defendant offered Jonas Phillips, a Jew, as a witness; but he refused to be sworn, because it was his Sabbath. The court, therefore, fined him 10 [Pounds]; but the defendant, afterwards, waiving the benefit of his testimony, he was discharged from the fine."

See also, Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A. 2d 134.

In 60 C. J., Sunday, § 113, p. 1150, it is said:

> "In a few jurisdictions there are statutes making it an offense maliciously to procure the service of process on Saturday, or to serve process returnable on Saturday, or maliciously to procure adjournment of a cause to Saturday, where the adverse party is one who observes that day as a day of worship; where the statute is violated, the process illegally served or returnable on that day is void, but, in order that it be so, the element of malice must be present, and, in the absence of such element, the act done is no offense, and the process served or returnable on Saturday is valid. Further, no act done on Saturday in the course of a judicial proceeding against a person observing that day as a day of worship is void unless it falls within the prohibitions of the statute dealing with the immunities of such persons. * * *"
> [Emphasis supplied.]

From all the foregoing, it is clear that the trial court did not err in requiring the appellant to stand trial on Friday evening.

III

Appellant's activities were in clear violation of the "Baby Broker's Act."

The appellant, who is a lawyer in active practice, admits that at the time of the offense he was well aware of the provisions of the "Baby Broker's Act" and the decisions of the court below in Goodman v. District of Columbia, 50 A. 2d 812 and Anderson v. District of Columbia, 154 A. 2d 717, appeal denied U. S. Court of Appeals, D. C., January 22, 1960, which construed the Act. In Goodman, the court made, and in Anderson repeated, the following admonition:

> "We think it plain that so long as the lawyer gives only legal advice; so long as he appears in court in adoption proceedings, representing either relinquishing or adopting parents; so long as he refrains from serving as intermediary, go-between, or placing agent; so long as he leaves or refers the placement of children and the arrangements for their placement to agencies duly licensed, he is within his rights under the statute. * * *" [Emphasis supplied.] (p. 815)

Appellant apparently finds no fault with the decisions in Goodman and Anderson, supra, but attempts to show that his activities were not so extensive as the activities of the appellants in those two cases. Appellant states that " * * * [n]either Goodman

nor Anderson put a sufficient gloss on the statute to have advised him adequately that his conduct has been made criminal, for in both those cases, the defendants had actually arranged the adoption or participated therein" (Appellant's brief p. 22).

Appellant's argument is a non sequitur. His activities in arranging for and assisting in the adoption were much more extensive than those of Goodman or Anderson. In the present case, there was evidence from which the trial court could, and apparently did, find that appellant directly produced the adopting parents and introduced them to the child's mother (J. A. 19, 50-51); that appellant was the go-between to deliver money to the mother and notify the adopting parents when the child arrived (J. A. 20-21); that he, in company with the adopting parents, visited the mother in the hospital, and made plans to take her and the baby home (J. A. 21); that he brought the mother flowers, and had her sign adoption papers he had prepared (J. A. 21-23, 42); that on the morning the mother was released from the hospital, he, in company with the adopting parents, arrived at the hospital, picked up the mother and child, drove some distance and then asked the mother to get out of his automobile and take a taxicab home in order that he could drive the adopting parents and baby to the airport (J. A. 21-22); that he

paid a fee to the baby-sitter for the mother's three children (J. A. 22); and that he represented the mother at a conference with her doctor pertaining to the disposition of the baby (J. A. 29-31). In addition, there was some evidence from which the court could have found that the appellant arranged and paid for an examination of the baby by a doctor of his choice (J. A. 29-30, 42-44).

From the foregoing, it is apparent that the appellant was more active as an intermediary than were the appellants in the Goodman and Anderson cases.

Contrary to appellant's suggestion, the actions of a lawyer acting as an intermediary in adoption cases must be judged by the same, or even higher, standards than those applicable to other persons acting as non-licensed child-placing agencies. This is clear from the legislative history of the Act as well as from the Act itself. In House Report No. 1674, 77th Congress, 2d Session, on H. R. 5892, which bill is substantially similar to the bill passed by the 78th Congress, it is said:

> "The purpose of the proposed act is to regulate the placement of children in family homes for care or for adoption. One of the most important effects of the act will be in the prevention of careless placement of babies for adoption, without adequate consideration of the interests of the parents, the children, and the adopting parents.

* * * * * *

> "Similar legislation exists in most of the States at the present time. The District now has no way of regulating persons or agencies dealing with children, nor of preventing persons or agencies operating as child-placing agencies for profit."

Adoptions are generally ambitious undertakings in the field of social welfare and human relations and unquestionably courts, parents, and adoptive parents alike need and desire the benefit of competent legal services in the successful culmination of such undertakings. But as necessary as a lawyer's services may be in the formal proceedings of adoption, the value of his counsel in the corollary sociological problem attached to each adoption proceeding is exceedingly limited and is entitled to no more wieght than the judgment of any other well-educated and generally informed person having no experience or training in the field of social welfare. It should be remembered that the "Baby Broker's Act" is directed only to unlicensed child-placing agencies. The responsibility concomitant with the successful placement of a child in a family home, whether it be for adoption or not, requires no legal training whatsoever; but it does unquestionably require a thorough, unbiased, and objective knowledge of the heredity, environment, culture, moral, education, and temperamental habits, traits, and customs of

all the parties involved, as well as a sound judgment respecting the probabilities of successful adoption after application of statistical information obtained from long experience in this field of endeavor.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the court below was in all respects correct and should be affirmed.

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 18,266

ABRAHAM DOBKIN,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 30 1964

Nathan J. Paulson
CLERK

Appeal From The District Of Columbia
Court Of Appeals

PETITION FOR REHEARING EN BANC

Appellant respectfully petitions for a rehearing of the above-captioned appeal by the Court en banc.

Appellant was convicted in the District of Columbia Court of General Sessions on December 14, 1962, of a violation of D. C. Code, § 32-785, a statute prohibiting unlicensed adoptions. A prior sentence of ninety days was imposed and he was fined $300.

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His conviction and sentence were affirmed by the District of Columbia Court of Appeals on November 4, 1963. Dobkin v. District of Columbia, 194 A.2d 657 (1963). On February 3, 1964, a division of this Court (Circuit Judges Fahy, Washington, and Bastian) granted appellant's petition for leave to prosecute an appeal from the District of Columbia Court of Appeals. The case was argued on October 8, 1964, before a division composed of Circuit Judges Miller, Burger, and McGowan and, on October 15, 1964, a per curiam judgment was entered by the Court affirming the judgment of the District of Columbia Court of Appeals "on the basis of the opinion of Judge Nathan Cayton."

The issues in this case in a very real sense transcend the case itself. They are issues of importance that have never before been considered by this Court. The Corporation Counsel, in a motion filed with this Court on April 3, 1964, recognized this fact by stating: "The Dobkin case presents three important questions which have not heretofore been considered by this Court." Appellant submits, therefore, in the light of the importance of the questions raised and the manner in which the District of Columbia Court of Appeals resolved these questions (a manner of

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resolution approved by the division that heard the case), that this case is an appropriate one for rehearing en banc.

1. The first question raised involves the interplay of two provisions of the District of Columbia Code relating to criminal jury trials in the Court of General Sessions. D. C. Code, § 11-715a, provides that in cases in which the accused has no constitutional right to a jury by trial, trial shall be by the court unless "the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days." D. C. Code, § 22-104, provides that upon a second conviction a 50% greater penalty (both as to fine and imprisonment) may be imposed. The statute that this appellant was convicted of violating, D. C. Code, § 32-788, provides a maximum penalty of $300 or ninety days or both, and this was the appellant's second conviction.

In Rogers v. District of Columbia, 31 A.2d 649, 652 (D.C. Mun. App. 1942), the then Municipal Court of Appeals held that in determining statutory entitlement to jury trial pursuant to D. C. Code, § 11-715a, dollars and days were not to be added, so that a maximum penalty of $300 and ninety days did not entitle an accused to trial by jury. That Court reiterated that holding

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POLITAN 8-0869

in this case, notwithstanding appellant's contention that the plain language of the statute required a contrary result.

In considering whether, as a second offender, the 50% increase in punishment would entitle the appellant to jury trial, the Court below held:

> "The real question is whether a defendant is subject to the 50 percent greater penalty just stated if he has not been given notice prior to trial that the prosecution will ask for the added penalty."

The Court answered this question in the negative, holding:

> "Since no notice was given to appellant that the government intended asking for the greater penalties, he was only subject to the penalty that could be imposed on a first offender.... In this case the government gave no notice to appellant prior to trial that he might be subject to the added penalties of §22-104; consequently he could not have been subjected to them."

By approving this rule for the Court of General Sessions, this Court has set up a direct conflict with the rules as they are applied in the United States District Court, for it is clear there that prior convictions need not be alleged in the indictment to justify imposition of an increased penalty as a result thereof. In Oyler v. Boles, 368 U.S. 448, 452 (1962), the United States Supreme Court held that "due process does not require advance

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POLITAN 8-6868

notice that the trial on the substantive offense will be followed by a habitual criminal proceeding." And this Court, in Jackson v. United States, 95 U.S. App. D.C. 328, 330, 221 F.2d 883, 885 (1955), and in Jordan v. United States District Court, 98 U.S. App. D.C. 160, 165, 233 F.2d 362, 367 (1956); precisely ruled that a prior offense need not be set forth in the indictment or information.

> "The Government also cites Jackson v. United States, 1955, 95 U. S. App. D. C. 328, 221 F. 2d 883. We there held that in the analogous situation where an additional penalty is sought under a statute authorizing it if the defendant has previously been convicted of a felony, the prior conviction need not be charged in the indictment. In the second offender situation, however, the criminal act which is prescribed is the same regardless of the background of the criminal; the previous offense is merely 'an historical fact,' as a result of which the penalty may appropriately be made more severe because of the demonstrated proclivities of the defendant."

These two questions respecting the appellant's right to a jury trial take on added significance in the light of this Court's recent opinion in Rollerson v. United States, (No. 17675, 10/1/64), n. 17 and Jacob v. City of New York, 315 U.S. 752, 753 (1942), wherein the Court said: "A right [to trial by jury] so fundamental and sacred to the citizen whether guaranteed by the

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Constitution or provided by statute, should be jealously guarded by the court."

2. The second issue presented by the case is whether the appellant's First Amendment rights were violated by forcing him to trial, over his objection, on a day that he regarded as his religious Sabbath, i.e., after sundown on Friday night. Treating this issue below, the Court said:

> "We would agree at once that no man ought to be required to violate his conscientious religious scruples by submitting to trial on a day he actually observes as one of worship. But here, inquiring into the situation, the trial court learned from appellant that he actually went to his office and worked on Saturdays, and was justified in concluding that there was no valid religious basis for putting the trial over to another day. Other circumstances, including the fact that the trial had been, without objection, reset for that day and hour, indicate that there was no prejudice in this situation."

In approving this resolution, this Court is sanctioning three fundamental errors. First and foremost, it is allowing the Court of General Sessions to sit in judgment on the adequacy of appellant's religious practices. That this is not permitted is clear from United States v. Ballard, 322 U.S. 78, 86 (1944); Braunfield v. Brown, 366 U.S. 599, 609 (1961); McCollum v. Board of Education, 333 U.S. 203, 210 (1948). The Court also erred in requiring a

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show of prejudice. It is abundantly clear from a constitutional point of view that a showing of prejudice is not required if, in fact, the appellant's constitutional rights have been violated. Ballard v. United States, 329 U.S. 187, 195 (1946); Thiel v. Southern Pacific Company, 328 U.S. 217, 225 (1946); and see Fahy v. Connecticut, 375 U.S. 85, 86 (1963). Moreover, the Court far too lightly purported to find acquiescence by the appellant in a judicial proceeding on Friday evening, acquiescence that was, in fact, only that of appellant's trial attorney. This runs contrary to the well-established principle that a court will not lightly infer a waiver of constitutional rights. Hodges v. Easton, 106 U.S. 408 (1882); and see Rodenbur v. Kaufmann, -- U.S. App. D.C. --,--, 320 F.2d 679, 683(1963).

What the Court should have done is to balance appellant's religious interest against the District's right to a trial on Friday night rather than on Monday morning. Sherbert v. Verner, 374 U.S. 398, 406-407 (1963); In re Jenison, -- Minn. --, --, 125 N.W. 2d 588, 589 (1963); People v. Woody, -- Cal. 2d --, 394 P.2d 813 (1964). Failure so to do was error of constitutional magnitude.

3. Finally, the appellant raised serious questions respecting the proper interpretation of this statute, particularly

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as applied in a criminal proceeding against a member of the Bar. Appellant did not and does not suggest that lawyers are or should be exempt from the provisions of the unlicensed adoption statutes of the District of Columbia. What the appellant did and does suggest is that in interpreting that statute to make criminal acts which prior to the statute have been part of a lawyer's normal function, in the absence of specific language requiring such a result, runs afoul of "ordinary notions of fair play and the settled rules of law." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); and see Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). The fact that attorneys are entitled to further guidance on permissible activity under this statute may be inferred from the fact that the only reported decisions thereunder are cases involving lawyers -- this case; Anderson v. District of Columbia, 154 A.2d 719 (D.C. Mun. App. 1959); Goodman v. District of Columbia, 50 A.2d 812 (D.C. Mun. App. 1947). An analysis of these cases, in chronological order, reveals that in each successive case the action of the attorney involved activities that could be less and less said to be proscribed by the specific statutory language. In Goodman, in 1947, the appellant apparently took upon himself the right to judge the propriety of the adoption and the reliability of the

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POLITAN 8-6966

adopting parents, something specifically prohibited by the statute. In Anderson, in 1959, a codefendant who had very clearly violated the statute made the arrangements and the appellant, with knowledge thereof, handled some of the later details. Now, in 1963, the District of Columbia Court of Appeals has extended the statute again to cover this appellant. The protection of members of the Bar of this jurisdiction requires an elucidation by this Court of the peripheral limits of statutes involved.

CONCLUSION:

None of these issues has ever been written upon by this Court and they involve matters of specific importance to the daily practice of law in the District of Columbia, and particularly in the Court of General Sessions. Accordingly, your appellant respectfully urges that this Court rehear this case en banc.

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Counsel for Appellant

October 30, 1964

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CERTIFICATE OF GOOD FAITH

I hereby certify that this petition is presented in good faith and not for purposes of delay.

Raymond W. Bergan

CERTIFICATE OF SERVICE

A copy of the foregoing petition was mailed first class, postage prepaid, this 30th day of October, 1964, to John R. Hess, Esq., Assistant Corporation Counsel for the District of Columbia, District Building, 14th and E Streets, Washington, D. C. 20004.

Raymond W. Bergan

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OLITAN 8-6868

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,266

ABRAHAM DOBKIN,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From the United States District Court
for the District of Columbia

FILED 1964

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,266

ABRAHAM DOBKIN,

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DISTRICT OF COLUMBIA,

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Appeal From the United States District Court
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REPLY BRIEF FOR APPELLANT

I

> "A right [to trial by jury] so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the court." Jacob v. City of New York, 315 U.S. 752, 753 (1942)

Moreover, this Court held just last year that all reasonable presumptions should be indulged in favor of trial by jury. *Rodenbur v. Kaufmann*, __U.S. App. D.C.__, __, 320 F.2d 679, 683 (1963). It is against this background that the appellant's right to trial by jury must be as-

sessed. His entitlement to trial by jury on a two-fold basis is clear.

A. The language of D. C. Code, § 11-715(a), makes $300 or ninety days the maximum penalties which may be imposed by a court sitting without a jury. Notwithstanding the decision of the former Municipal Court of Appeals in *Rogers v. District of Columbia*, 31 A.2d 649 (D. C. Mun. App. 1942), the appellant asserts that his right is guaranteed by that statute. The imaginary horribles conjured up by the Corporation Counsel are no justification for not giving the language of the statute what appears to be its plain meaning. *United States v. Ganaposki*, 72 F. Supp. 982, 985 (M. D. Pa. 1947).

B. In response to the appellant's assertion that, as a second offender, he was entitled to a jury trial because it was possible to impose upon him a more severe (and concededly a jury demanding) penalty, the Corporation Counsel again dredges up the discredited argument that the appellant never made a proper demand. Perhaps the quick and easy answer to this assertion is that the District of Columbia Court of Appeals decided the appellant's assertion on the merits (J.A. 57-60) and that the argument presently made by the Corporation Counsel is made for the first time in this Court. The deference which this Court should yield to the court whose decision is under review should require that this Court proceed to determine the merits of the appellant's contention.

The gist of the decision by the District of Columbia Court of Appeals is its answer to the question whether "a defendant is subject to the fifty per cent greater penalties . . . if he has not been given notice prior to the trial that the prosecution will ask for the added penalties" (J.A. 58-59). By answering this question in the negative, the District of Columbia Court of Appeals appears to be saying that it is the prosecution, and the prosecution alone, which, in situations of this type, determines whether the defendant is entitled to trial by jury. Such con-

trol by the prosecutor over a "right so fundamental and sacred" cannot be tolerated. No answer is given either by the court below or by the Corporation Counsel as to why this appellant could not have advised the court (as he did) of the fact that he was a second offender and chance the more severe penalty in exchange for the "jealously guarded" right to trial by jury.

II

In response to the appellant's assertion that he was entitled not to be tried on his Sabbath, the Corporation Counsel does not even attempt to meet the argument suggested by *Sherbert v. Verner*, 374 U.S. 398 (1963) and *In re Jenison*, __Minn.__, 125 N.W.2d 588 (1963), that a balancing of interest is involved in the application made by the appellant. The Corporation Counsel does not try to justify the District of Columbia's insistance on trying this appellant on Friday night rather than on Monday morning. Moreover, the testimony is uncontroverted that the appellant advised his attorney, as soon as he was aware of the situation, that he objected to a trial commencing on his Sabbath (J.A. 15-16). This Court in the past has held it to be an abuse of discretion to deny an adjournment from Friday to Monday under certain circumstances. *Laughlin v. Berens*, 73 App. D.C. 136, 118 F.2d 193 (1940). Under the circumstances of this case, appellant submits that a similar ruling is required.

III

The District of Columbia does not attempt in its brief to undermine the distinctions which the appellant has suggested between the facts of his case and the facts in *Goodman v. District of Columbia*, 50 A.2d 812 (D. C. Mun. App. 1947), and *Anderson v. District of Columbia*, 154 A.2d 719 (D. C. Mun. App. 1959). In both *Goodman* and *Anderson* there was

clear evidence that the defendant had arranged, or participated in arranging, the adoption. The most that the evidence in this case establishes, as is conceded by the Corporation Counsel, was that the appellant acted as an intermediary between the natural mother and the adopting parents, **not in arranging the adoption**, but in other ancillary and incidental matters, i.e., escrow of funds for the support of the child, transportation, preparation of adoption papers, and the like. This falls far short of the conduct sanctioned in *Goodman* and *Anderson*. As the appellant, himself, testified, he was aware of the *Goodman* and *Anderson* cases (J.A. 46). Being aware of the opinions, he was aware of the ramifications thereof, and guided his conduct so as to stay within permissive bounds. The evidence suggests that he did just this.

CONCLUSION

For the foregoing reasons, together with those expressed in the original brief filed in the case, appellant submits that his conviction must be reversed.

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 18,266

ABRAHAM DOBKIN,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 9 1964

Nathan J. Paulson
CLERK

OPPOSITION OF DISTRICT OF COLUMBIA TO PETITION FOR REHEARING EN BANC

On the grounds and for the reasons set forth below, the District of Columbia opposes the "Petition for Rehearing En Banc."

Everything that petitioner relies upon in support of his petition for rehearing was extensively briefed, strenuously urged during oral argument, and fully and correctly disposed of by this Court. In support of his contention that he was entitled to a jury trial, petitioner argues here, as he did before a panel of this Court, two points.

The first point is that the possible sentence for violation of the offense with which he was charged is $300 or 90 days or both, and that such sentence is sufficient to bring him within the provisions of Section 11-715a, D. C. Code, 1961, which provides for a jury trial if " * * * the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days * * *." In this connection he argues that the words "fine" and "penalty" are not synonymous, and that any imprisonment added to a $300 fine is a "penalty" in excess of $300. The Congress has, however, in many instances,used the words "fine" and "penalty" interchangeably. See, for example, Section 22-1107, D. C. Code, 1961, wherein the sentence provided for the offense therein proscribed is " * * * a penalty of not more than $250 or imprisonment for not more than ninety days, or both * * *" [emphasis supplied], and Section 22-1108, D. C. Code, 1961, wherein the sentence provided for the offense therein proscribed is " * * * a penalty of not more than five dollars for each and every such offense" [emphasis supplied]. In addition, if petitioner's interpretation of Section 11-715a, supra, is adopted, a jury trial would be required for practically every offense tried in the District of Columbia Court of General Sessions, including such minor offenses as the overtime parking of an automobile. Certainly the Congress did not intend any such result.

Petitioner's second point in support of his contention that he was entitled to a jury trial is that he is a second offender, and that, under Section 22-104, D. C. Code, 1961, the punishment for the second offense could have been increased 50 per cent, thereby bringing him within the jury trial provisions of Section 11-715a, supra. The fact is, however, that petitioner was neither charged nor sentenced as a second offender. In seeking a jury trial, he did not call the court's attention to the fact that he was a second offender, nor did he so much as mention the applicability or even the existence of Section 22-104, supra. Under such circumstances, petitioner can hardly be serious in his contention that the trial court erred in failing to give due consideration to facts which were not called to its attention. The cases cited by petitioner are not apposite. In those cases, the accused was entitled to a jury trial irrespective of the fact that he was a second offender. If petitioner's reasoning prevails, jury trials will be required for practically all offenses tried in the District of Columbia Court of General Sessions when the accused has previously been convicted of a like offense.

Petitioner argues next, as he did below, that his constitutional rights were violated by requiring him to proceed to trial on Friday evening, the advent of his Sabbath. A review of the record,

however, will disclose that no constitutional question is involved. All that is involved is the question of whether the trial judge abused her discretion in refusing to grant petitioner's eleventh-hour request for a continuance. In this connection the court below stated:

> "* * * We would agree at once that no man ought to be required to violate his conscientious religious scruples by submitting to trial on a day he actually observes as one of worship. But here, inquiring into the situation, the trial court learned from appellant that he actually went to his office and worked on Saturdays, and was justified in concluding that there was no valid religious basis for putting the trial over to another day. Other circumstances, including the fact that the trial had been, without objection, reset for that day and hour, indicate that there was no prejudice in this situation" (J. A. 57).

As to petitioner's final argument, he apparently now concedes, as he must, that lawyers are not and should not "* * * be exempt from the provisions of the unlicensed adoption statutes of the District of Columbia. * * *" His complaint appears to be that "* * * attorneys are entitled to further guidance on permissible activity under this statute * * *." If any guidelines were needed, they certainly were set forth in the clearest of terms by the court below in Goodman v. District of Columbia, 50 A. 2d 812. There the court said:

> "We think it plain that so long as the lawyer gives only legal advice; so long as he appears in court in adoption proceedings, representing either relinquishing or adopting parents; so long as he refrains from serving as intermediary, go-between, or placing agent; so long as he leaves or refers the placement of children and the arrangements for their placement to agencies duly licensed, he is within his rights under the statute. * * *" (p. 815)

The court below repeated this admonition in Anderson v. District of Columbia, 154 A. 2d 717, appeal denied U. S. Court of Appeals, D. C., January 22, 1960. Petitioner admitted in the trial court that he was well aware of the above two decisions, but contended that his activities were not so extensive as were Goodman's or Anderson's. The record, however, discloses that petitioner was much more active as an intermediary than either Goodman or Anderson. Under the circumstances, petitioner must have known that he was in clear violation of both the letter and spirit of the Baby Broker Statute when he procured the adopting parents, introduced them to the child's mother, and looked after every detail before and after the actual transfer of the baby from its mother's arms to the arms of the adopting parents.

CONCLUSION

In view of the foregoing, it is submitted that no question of sufficient importance is set forth by petitioner as to warrant consideration by this entire Court.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Opposition was mailed, postage prepaid, this 9th day of November, 1964, to Raymond W. Bergan, Esq., Attorney for Appellant, Hill Building, Washington, D. C.

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